CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 468

EMMETT COCHRAN, W. M. GUICE, JR., HENRY STEINAU, ET AL., APPELLANTS,

vs.

LOUISIANA STATE BOARD OF EDUCATION ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

FILED OCTOBER 29, 1929

(34,599)

(34,599)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 468

EMMETT COCHRAN, W. M. GUICE, JR., HENRY STEINAU, ET AL., APPELLANTS,

vs.

LOUISIANA STATE BOARD OF EDUCATION ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

INDEX

	Original	Print
Record from district court of East Baton Rouge Parish....	1	1
Petition	1	1
Order to show cause.....	11	10
Exceptions and answer to rule.....	12	10
Opinion, Favrot, J.....	21	17
Proceedings in supreme court of Louisiana.....	25	20
Petition for writs of mandamus, prohibition, and certiorari, case No. 29,557.....	25	20
Opinion per curiam, case No. 29,557.....	34	30
Opinion, Overton, J., case No. 29,579.....	35	34
Opinion, Overton, J., case No. 29,569.....	36	31
Opinion, Rogers, J., concurring in part and dissenting in part, case No. 29,569.....	47	41
Petition for rehearing.....	53	46
Order denying rehearing.....	55	48

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D C., NOVEMBER 27, 1929

	Original	Print
Petition for appeal, assignments of error, and prayer for reversal	56	49
Order allowing appeal	59	51
Citation and service (omitted in printing)	60	
Bond on appeal (omitted in printing)	61	
Præcipe for transcript of record	63	52
Clerk's certificate (omitted in printing)	64	
Judge's certificate to clerk (" " ")	65	
Clerk's certificate to judge (" " ")	66	
Statement of points to be relied upon and designation to print entire record	67	54

[fols. a & 1]

IN DISTRICT COURT OF EAST BATON ROUGE PARISH

No. 3578

EMMETT COCHRAN et als.

vs.

LOUISIANA STATE BOARD OF EDUCATION et als.

PETITION—Filed August 17, 1928

To the Honorable Judges of the Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana:

The petition of Emmett Cochran, William M. Guice, Jr., Henry G. Steinau, and Allie H. Tarver, all residents of the Parish of Caddo, State of Louisiana, with respect represents:

I

That all of your petitioners are citizens and taxpayers of the State of Louisiana, being the owners of both real and personal properties, located within the State, upon which your petitioners pay to the State of Louisiana and the political subdivisions thereof, State, Parish, Road and Public School Taxes for the support and maintenance of the Public School system of the State of Louisiana.

2

That the Louisiana State Board of Education, one of the defendants herein, is a body politic and corporate, organized and existing under the laws of the State of Louisiana, domiciled in the City of Baton Rouge, Parish of East Baton Rouge, Louisiana, having H. H. White, of Alexandria, Rapides Parish, Louisiana, as its President.

3

That your petitioners are patrons of the public schools system of the State of Louisiana, each having one or more

children who have been, are now and will continue for several years hereafter to be enrolled in attendance in the public schools of the Parish and community in which your petitioners live and reside.

[fol. 2] 4

That the State of Louisiana has levied and collected under the provisions of Act No. 140 of 1922, by the Legislature of Louisiana, and laws amendatory thereof, what is commonly known as the Severance Tax on natural resources within the State.

5

Your petitioners show that, unless restrained and enjoined, the defendant, Louisiana State Board of Education, will illegally expend and distribute and will continue to expend and distribute indefinitely, the Severance Tax Fund aforesaid as it accrues in order to supply school books free of cost to all the school children of the State of Louisiana, including children attending private, religious, sectarian and other schools not embraced in the public educational system of the State of Louisiana; and even now is preparing to purchase and will purchase with the public funds aforesaid, the said school books to be supplied and donated to the persona aforesaid, the said defendant giving as its authority for said acts Act No. 100 by the Legislature of Louisiana for the year 1928, and also Act No. 143 of 1928, the latter being the General Appropriation Act of the Louisiana Legislature of that year.

6

That Thomas H. Harris, State Superintendent of Public Education, whose official domicile is in the City of Baton Rouge, Parish of East Baton Rouge, Louisiana, and who holds the position of executive officer of the Louisiana State Board of Education, is preparing to carry into effect the distribution of free text books as outlined above, and is even now instructing Parish School Boards of this State to purchase all school books, and is otherwise preparing to expend and distribute illegally public monies under the authority of said acts; and it is, therefore, necessary that he

be made a party defendant and enjoined from the illegal acts herein complained of.

[fol. 3] 7

Your petitioners further show that, unless restrained and e-joined, L. B. Baynard, Auditor of Public Accounts for the State of Louisiana, and H. B. Connor, Treasurer of the State of Louisiana, both having their official domiciles in the city of Baton Rouge, Parish of East Baton Rouge, Louisiana, will aid and assist in the wrongful use and distribution of said public monies and funds by the drawing and payment of warrants out of the same at the instance of the Louisiana State Board of Education and said Thomas H. Harris, all to the irreparable injury and damage to your petitioners, and that restraining orders and preliminary writs of injunction are necessary to protect the rights of your petitioners in the premises, directed against said officials who are also made defendants herein.

8

That Act No. 100 of the Legislature of Louisiana for the year 1928, being one of the acts under which said defendants are acting and preparing to act, provides for the distribution and expenditure of the fund realized from the collection of severance taxes in an indefinite amount, but sufficient, if available, to supply school books free of cost to all school children of the State of Louisiana, which necessarily includes books free of cost for children attending private, sectarian, religious and other schools, which constitute no part of the public educational system of the State of Louisiana, but which are especially and expressly excluded therefrom by the Statutes and by the Constitution of this State.

9

Your petitioners show that few, if any, of the school children of the State of Louisiana, are inmates of public charitable institutions conducted under State authority; that few, if any, of the parents, patrons, tutors or guardians, of the school children of the State of Louisiana are subjects of charity or benevolence; that patrons, parents,

[fol. 4] guardians and tutors of the school children of this State are amply able to provide the necessary school books for the school children for whom they are responsible; and that the parents, patrons, guardians, and tutors of the school children attending private, religious, sectarian or other schools not embraced in the educational system of the State of Louisiana are able to pay and do pay a tuition or other fees or charges to said schools.

That the courses of study and the school books prescribed by the private, religious and other schools aforesaid not embraced in the public educational system of the State of Louisiana, are different from those prescribed and used in the free public schools of this State, and the Louisiana State Board of Education has no right or authority to prescribe the course of study or the school books to be used by the children attending the schools constituting no part of the public educational system of the State of Louisiana, and petitioners show that there is a large number of such private and sectarian or denominational schools in the State of Louisiana where religious instruction is included in the course of study, and many of the school books selected, used and required in such schools, are designed and employed to aid and promote the religious beliefs, and to foster and encourage the principles of faith, and to teach the tenets of the creed, mode of worship, and ecclesiastical policy of the respective churches under whose respective control the said schools are conducted.

II

That the amount of taxes paid by your petitioners and each of them for the support of the public educational system of the State of Louisiana greatly exceeds the amount or the value of the books that would be allotted to them as patrons of the public school system and to their children who are in attendance in the free public schools of this State.

12

That Act 100 of 1928 provides that the public monies, [fol. 5] known as the Severance Tax Fund, shall first be applied to the purchase and distribution of school books free of cost to all school children of the State, which will

mean the expenditure of a large portion of said fund in aid of private persons and institutions, the balance, if any, to be devoted to the support of public education; and if the provisions of said act, as well as of the provisions of Act 143 of 1928, for the giving and donation of school books to all school children are carried out, there will be diverted for private and illegal purposes a large portion of said fund which would otherwise be devoted to the support of the free public schools of the State, of which your petitioners are patrons, and for the support of which they pay taxes; all of which will result in irreparable injury to your petitioners.

13

As will be shown by a copy of Circular No. 2467, dated July 3rd, 1928, issued by Thomas H. Harris, and addressed of the Parish Superintendents of the various parishes of the State, hereto attached and made part hereof, the local cost of administration of said Acts above referred to will have to be borne by the various parish school boards, as nothing whatever was set aside in said Acts for administration, and thus again there will be illegally diverted from said Parish School Funds a large amount of money, to which Parish School Funds your petitioners contribute as taxpayers both in State and Parish School Taxes, constituting public funds for private and sectarian and illegal purposes which would otherwise be devoted for the support of the free public schools within said parishes; all to the irreparable injury to your petitioners.

14

That said Acts Nos. 100 and 143 of 1928 provide for the purchase and distribution of school books out of the Severance Tax Fund free of cost to the school children of the State of Louisiana, but do not provide for the return of [fol. 6] said books to the State of Louisiana by the said school children to whom they are distributed after they have completed and finished the study of said books, nor do they provide for the indemnif-ation of the State in case of the loss or descruction or injury of said books by said school childern or any of them. Your petitioners show, therefore, that said Acts provide for the pure and simple

donation of said books by the State to said school children, which is wrongful and illegal and unconstitutional.

15

That said Act 100 of 1928, or so much thereof as provides for the purchase and distribution of school books, is contrary to the public policy of the State of Louisiana, and is unconstitutional, null and void, for the following reasons, to-wit:

(a) That the expenditure of said public monies as aforesaid for such illegal purposes is the taking of your petitioners' property for a private purpose without due process of law and contrary to guaranteed republican form of government, in violation of Section 2 of Article I of the Constitution of Louisiana, and in violation of Section 4 of Article IV and of the 14th Amendment of the Constitution of the United States.

(b) That said Act violates Sections 1 and 10 of Article IV of the Constitution of Louisiana in that it attempts to draw money from the public treasury without a specific appropriation therefor by law, and for a specific amount, and further violates Section 1 in that it attempts to draw money from the public treasury for a longer term than two years.

(c) That said Act violates Section 8 of Article IV of the Constitution of Louisiana in that it authorizes the taking of money from the public treasury for the purpose of teaching religion, and is in aid of churches, sects, or [fol. 7] denominations of religion, which is also in violation of Section 4 of Article I of the Constitution of Louisiana; that said Act further violates Section 8 of Article IV of the Constitution of Louisiana in that it provides for the expenditure and distribution of public funds for private, charitable or benevolent purposes to private persons and institutions.

(d) That said Act violates Section 12 of Article IV of the Constitution of Louisiana in that it loans or grants to or for private or public persons, associations, corporations and institutions funds, credit, property, or things of value of the State of Louisiana.

(e) That said Act violates Section 13 of Article XII of the Constitution of Louisiana in that it attempts to use public funds for the support of private or sectarian schools.

16

That said Act No. 143 of 1928, in so far as it attempts to make two appropriations, "Out of the severance tax fund," of $750,000.00 for the years 1928-29 and 1929-30, for the purchase and distributions of free school books for all the school children of the State, is unconstitutional, null and void, for the following reasons, to-wit:

(a) That said Act is violative of Section 16 of Article III of the Constitution of Louisiana, in that there is nothing in the title of said act indicative of the object of said Act.

(b) That said Act violates Section 8 of Article IV of the Constitution of Louisiana in that it pretends to appropriate money from the State Treasury for private, charitable, or benevolent purposes to private persons and institutions.

(c) That said Act violates Section 9 of Article IV of the Constitution of Louisiana in that such appropriations are for purposes other than those which by said Section may be embraced in the general appropriation bill.

(d) That such appropriations violate Section 10 of Ar-
[fol. 8] ticle IV of the Constitution of Louisiana in that they are not for a specific purpose or for a specific amount.

(e) That said appropriations are violative of Section 1 of Article XII of the Constitution of Louisiana in that such appropriations cover all schools, private as well as public.

(f) That such pretended appropriations are violative of Section 13 of Article XII of the Constitution of Louisiana in that they authorize the using of public funds for the support of private or sectarian schools.

(g) That said appropriations amount to the taking of petitioners' property for private purposes without due process of law and contrary to guaranteed republican form of government in violation of the aforesaid provi-

sions and of Section 2 of Article I of the Constitution of Louisiana, and in violation of Section 4 of Article IV and of the 14th Amendment to the Constitution of the United States.

17

That in the event the Court should hold that said Acts complained are not unconstitutional, null and void for the reasons hereinabove assigned, then your petitioners show that said Acts provide for the expenditure and appropriation of said funds, this to be effected and expended by the State Board of Education, and are, therefore, in violation of Section 14 of Article XII of the Constitution of Louisiana, which requires that school funds, such as realized from the Severance Tax, shall be distributed to each parish in proportion to the number of children therein between the ages of six and eighteen years, for the benefit of such children of the free public schools, their guardians and parents, including your petitioners.

18

Petitioners avers that in the ordinary course notice cannot be served, hearing had and decision rendered upon application for a preliminary writ of injunction prior to the [fol. 9] beginning of procedure on the part of the defendants and the entering into negotiations for the purchase and distribution of a portion of the Severance Tax Fund, and that immediate and irreparable injury, loss and damage will result to your petitioners from such facts and that such loss can be avoided only by the issuance by this Court of temporary restraining orders.

19

Your petitioners aver that as taxpayers and citizens of the State of Louisiana, as hereinabove alleged, they have a common interest in the prosecution of this suit to enjoin the wrongful use and distribution of public funds, including taxes paid by them, in violation of constitutional limitations and prohibitions, and that the subject matter of this suit exceeds $2,000.00, exclusive of costs and interest.

Wherefore petitioners pray that a rule nisi issue herein directed to the defendants, Louisiana State Board of Education, Thomas H. Harris, State Superintendent of Education, L. B. Baynard, Auditor of Public Accounts, and H. B. Connor, Treasurer, to show cause at a date and hour to be fixed by this Court why said defendants should not be restrained and prohibited from using, expending, or contracting to expend, any of the severance tax fund aforesaid to purchase and supply school books free of cost to the school children of the State of Louisiana, and why they and each of them should not be restrained and enjoined from purchasing and supplying school books to the school children of the State, and from taking any action whatsoever under said Acts Nos. 100 and 143 of 1928, for the purchase, supply or distribution of free school books.

Your petitioners further pray that upon hearing, said rule be made absolute, and a preliminary injunction issue.

Petitioners further pray that the said defendants and each of them be duly cited, according to law, to appear [fol. 10] and to answer hereto, and, after all legal delays and legal proceedings had, there be judgment in favor of your petitioners, and against the defendants, decreeing Acts Nos. 100 and 143 of 1928, by the Legislature of the State of Louisiana, to be unconstitutional, null and void, in so far as they provide for the purchase and distribution of free school books to the school children of the State of Louisiana, and perpetuating the said injunction enjoining the defendants from providing school books for the school children of the State of Louisiana free of cost out of the severance tax fund, and from entering into any negotiations for that purpose.

Petitioners further pray for all others and decrees necessary, for costs, and for general and equitable relief.

(Sgd.) Galloway & Johnson, Attorneys for Petitioners.

Duly sworn to by William H. Guice, Jr., and Allie H. Tarver. Jurats omitted in printing.

[fol. 11] In District Court of East Baton Rouge Parish

Order to Show Cause

It is ordered that a rule nisi issue, directed to the defendants, Louisiana State Board of Education, Thomas H. Harris, State Superintendent of Public Education, L. B. Baynard, Auditor of Public Accounts, and H. B. Connor, Treasurer of the State of Louisiana, to show cause on the 24 day of August, 1928, at 10 o'clock A. M., why a preliminary injunction should not issue restraining and prohibiting them and each of them from using, expending or contracting to spend any of the Severance Tax Funds aforesaid to purchase and supply school books free of cost to the school children of the State of Louisiana, and restraining and prohibiting them and each of them from purchasing and supplying any school books to the school children of the State of Louisiana, and from taking any actions whatsoever under Acts Nos. 100 and 143 of 1928 for the purchase or supplying of free school books.

Baton Rouge, Louisiana, August 17, 1929, 9:50 o'clock a. m.

(Sgd.) Geo. J. Favrot, Judge 19th District Court.

[fol. 12] In District Court of East Baton Rouge Parish

[Title omitted]

Exceptions and Answer to Rule—Filed August 24, 1928

In this cause now come the Louisiana State Board of Education, Thomas H. Harris, State Superintendent of Education, L. B. Baynard, Jr., Auditor of Public Accounts, and H. B. Connor, Treasurer of the State of Louisiana, made defendants in the above numbered and entitled cause, and before answering plaintiffs' petition plead the exceptions of no cause and no right of action for the reason that the plaintiffs do not show any special pecuniary interest or interest arising from any contractual relation with the State of Louisiana, other than as citizens, taxpayers and patrons of the schools; and that in such cases citizens, tax-

payers and patrons of the public schools have no right to enjoin state boards or state officers from disposing of state funds, even if the law under which the proposed distribution is to be made should be unconstitutional, which in this case is denied; and for the further reason that since the legality of the severance tax acts is not assailed, and since the Legislature has dedicated such taxes to the cause of public education in this State, the plaintiffs are without right or interest to question the manner or method specified by the Legislature for the expenditure of such funds or to seek to prevent, by injunction or otherwise, the administration of said funds by the State Board of Education to which said Board the distribution and disbursement of said fund have been specifically and particularly entrusted and in carrying out which administrative duty your respondents are about to engage; and for the further reason that this is in effect a suit against the State and not maintainable, even if plaintiffs had a pecuniary interest, which is denied.

[fol. 13] And now reserving the benefict of the foregoing pleas in case same should be overruled, defendants answer plaintiffs' petition as follows:

I

Respondents admit the allegations of Paragraph I of plaintiffs' petition.

II

Respondents admit the allegations of Paragraph 2 of plaintiffs' petition.

III.

Respondents admit the allegations of Paragraph 3 of plaintiffs' petition.

IV

Respondents admit the allegations of Paragraph 4 of plaintiffs' petition.

V

Respondents deny the allegations of Paragraph 5, except as hereinafter admitted. Respondents admit the adoption by the Legislature of Louisiana for the year 1928 of Act No. 100, being what is known as the Free School Book Act,

and of Act No. 143 of 1928, being the General Appropriation Act of the Louisiana Legislature of that year, and admit that they are preparing to expend and distribute the severance tax fund as it accrues in order to supply school books free of cost to all the school children of the State of Louisiana, and are preparing to purchase and will purchase, unless restrained, with the public funds aforesaid, the said school books for the use of all the school children of the State of Louisiana.

VI

Respondents admit the allegations of Paragraph 6 of plaintiffs' petition, except that they deny that the action of Thomas H. Harris, State Superintendent of Public Education, in preparing to carry into effect the distribution of free text books is in any sense illegal.

[fol. 14]

VII

Answering Paragraph 7 of plaintiffs' petition, respondents admit that unless restrained and enjoined, L. B. Baynard, Jr., Auditor of Public Accounts of the State of Louisiana, and H. B. Conner, Treasurer of the State of Louisiana, both having their official domiciles in the City of Baton Rouge, Parish of East Baton Rouge, State of Louisiana, will aid and assist in the distribution of said public monies, but deny that said aid and assistance is in any sense wrongful and illegal, deny that petitioners will suffer any injury or damages whatsoever and deny that restraining orders and preliminary writs of injunction are necessary to protect the rights of petitioners in the premises.

VIII

Answering Paragraph 8 of plaintiffs' petition, respondents admit the adoption of Act No. 100 of the Legislature of Louisiana for the year 1928 in the words and figures of the Act, otherwise deny the allegations of said Paragraph.

IX

Answering Paragraph 9 of plaintiffs' petition, respondents admit that few, if any of the said school children of

the State of Louisiana, are inmates of public charitable institutions, conducted under State authority. For lack of specific information, on the subject, respondents can neither affirm nor deny to what extent parents, patrons, tutors or guardians of the school children of the State of Louisiana are subject to charity or benevolence, or to what extent they are able to provide the necessary school books for the school children for whom they are responsible, or to what extent they are able to pay and do pay tuition or other fees or charges to church, private, religious, sectarian or other schools not embraced in the educational system of the State of Louisiana.

[fol. 15]

X

Respondents deny the allegations of Paragraph 10 of plaintiffs' petition, except that there are private and sectarian schools in the State which include in their curricula religious instruction. Further answering this paragraph, respondents aver that it is not their intention nor purpose to furnish free, or otherwise, any sectarian or denominational text books to the school children of the State of Louisiana, but that respondents propose to furnish, and will furnish, to the educable school children of the State of Louisiana only such text books as have been approved by the State Board of Education; and that respondents only propose to furnish such books to the educable school children of the State attending schools, curricula of which have been approved by the State Board of Education of Louisiana.

XI

Respondents lack sufficient information on which to base an answer to Paragraph 11 of plaintiffs' petition, and, therefore, deny the allegations of same.

XII

Respondents deny all of the allegations of Paragraph 12 of plaintiffs' petition, except that they admit the passage of Acts No. 100 and No. 143 of 1928 in the words and figures of said Acts.

XIII

Respondents admit the issuance by Thomas H. Harris of Circular No. 2467 in the words and figures of the circular, but otherwise deny the allegations of paragraph 13 of plaintiffs' petition and specifically deny that any injury will be suffered, either irreparable or otherwise, by petitioners.

XIV

Respondents admit the passage of Acts No. 100 and No. 143 of 1928 in the words and figures of the acts. They otherwise deny the allegations of Paragraph 14 of plaintiffs' petition and specifically deny that said acts are in any [fol. 16] sense illegal and unconstitutional.

XV

Respondents deny that Act 100 of the Legislature of Louisiana of 1928 is unconstitutional in any of the respects detailed in Paragraph 15 of plaintiffs' petition, or in any respect whatsoever.

XVI

Respondents deny the allegations of fact contained in paragraph 16 of plaintiffs' petition and aver that Act 100 of 1928, and Act 143 of 1928, are to be construed together; and respondents further deny that the aforesaid act 143 of 1928 is in contravention of any of the provisions of the Constitution of Louisiana of the year 1921.

XVII

Answering Paragraph 17 of plaintiffs' petition, respondents aver that both Act 100 of 1928 and Act 143 of 1928, are, in their opinion, constitutional and in furtherance of the policy and duty of the State to furnish free education to all of the educable school children of the State, and that said Acts are not in contravention of Section 14 of Article XII of the Constitution of Louisiana of 1921.

XVIII

Respondents deny the allegations of Paragraph 18 of plaintiffs' petition.

XIX

Respondents deny the allegations of Paragraph 19 of plaintiffs' petition, except that the subject matter of this suit exceeds $2,000.00, exclusive of costs and interest.

XX

Further answering, respondents aver that, believing in the constitutionality of Act 100 of 1928 and of Act 143 of 1928, respondents propose and are preparing, unless restrained by the order of this Honorable Court, to furnish free text books to the educable school children of the State, but their purpose is to only furnish such books as are approved by the State Board of Education, or which may be [fol. 17] approved by said Board, and legally acquired under the contracts made by the State Board of education and the State Superintendent of Education for the purchase of text books. Respondents particularly deny that it was or is their intention or purpose to furnish to any of the educable school children of the State of Louisiana any books or books of a religious or denominational character, or relating to any religious sect or denomination, but only such books as are or may be prescribed by the State Board of Education of Louisiana.

XXI

Further answering, respondents aver that it is a well established policy of the State of Louisiana and its bounden duty to furnish educational facilities to every child of educable age within the State, and that the State has made it mandatory upon the parents of such children to compel their attendance at a public or private school as it is set out in Act 117 of the Legislature of Louisiana of the year 1922, and which Act penalizes the parents of such children for failure to comply with its provisions; that it is notorious that the State and its subdivisions have not been able to furnish and maintain sufficient public schools to furnish

educational facilities to all of the educable children of the State and which the State by compulsory law requires to be educated; that the private schools of the State of Louisiana thus become and are, agencies of the State, aiding in the education of its children and making it possible to educate many thousands who would otherwise be deprived of educational advantages; that the children attending private schools under statutory requirements of the State are as much entitled to the use of free books as those who are being educated at greater expense to the State in the public schools thereof; that the Legislature of the State of Louisiana has as much authority and power to provide that all of the educable children of the State shall be furnished [fol. 18] with free text books regardless of whether said children are in attendance upon public or private schools as the State has to compel the free passage on ferries and toll bridges of all school children of the State whether said children are in attendance upon public or private schools. That the primary policy of the aforesaid acts of the legislature is providing free text books for the educable school children of the State, without discrimination as to race, sex, religion or creed, and respondents aver that if any children of the State are denied the privilege of obtaining free school books from the State of Louisiana because of the fact that such children are attending private or sectarian schools, such discrimination would be arbitrary, unjust and illegal, as well as unconstitutional, and incapable of legal enforcement.

Respondents further and specially answering, aver that the avails of the severance taxes of Louisiana levied under the provisions of Act 140 of 1922, and laws amendatory thereof, are, by the provisions of Act 100 of 1928, constituted a trust fund of the State, dedicated to public education and particularly to the two purposes, viz: 1st. To the purchase of text books to be supplied free to the school children of the State; and secondly, such amounts thereof as may remain after the purchase of text books to be applied and dedicated to the State Public school fund.

Your respondents aver that that the respondent State Board of Education is the designated administrative department which is charged with the duty of administering the aforesaid severance tax fund, and in the manner speci-

fied by the Legislature, and in pursuance of Article XII, Section 8, of the Constitution of Louisiana of 1921, which provides that "the Legislature shall prescribe the terms under which funds offered for educational purposes shall be received and disbursed."

Your respondents aver that since the legality of the aforesaid severance tax is not assailed, and since the Legisla- [fols. 19 & 20] ture has dedicated such taxes to the cause of public education in this State, the plaintiffs are without right or interest to question the manner or method specified by the Legislature for the expenditure of such funds or to seek to prevent, by injunction or otherwise, the administration of said funds by the State Board of Education to which said Board the distribution and disbursement of said fund has been specifically and particularly entrusted, and in the carrying out of which administrative duty your respondents are about to engage.

Wherefore respondents pray that the rule nisi issued in this case be discharged; that the prayer of plaintiffs' petition be rejected; that plaintiffs' suit be dismissed at their costs, and for all general and equitable relief in the premises.

By Their Attorneys, (Sgd.) Percy Saint, Attorney General. (Sgd.) Peyton R. Sandoz, Assistant Attorney General. (Sgd.) White, Holloman & White, (Sgd.) Burke & Smith, of Counsel. Huey P. Long, of Counsel for L. B. Baynard, Jr., Auditor, & H. B. Conner, Treasurer.

Duly sworn to by Peyton N. Sandoz. Jurat omitted in printing.

[fol. 21] IN DISTRICT COURT OF EAST BATON ROUGE PARISH

[Title omitted]

OPINION—Filed August 28, 1928

Counsel for relator cites authorities holding that a tax payer may sue to enjoin the illegal use of funds of a municipal corporation. This has been so generally held that

it may be considered as settled, because in its relation to its citizens and taxpayers a municipality may be likened to a private corporation and its citizens and taxpayers to the stockholders of the corporation. No such relation exists between the sovereign state and its citizens and taxpayers:

In Massuchusetts vs. Mellon, 262 U. S. 486, 489, 67 L. Ed. 1078-1084, Mr. Justice Sutherland, the organ of the Court, said:

"The attack upon the statute in the Frothingham Case is, generally, the same, but this plaintiff alleges, in addition that she is a taxpayer of the United States; and her contention, though not clear, seems to be that the effects of the appropriations complained of will be to increase the burden of future taxation and thereby take her property without due process of law. The right of a taxpayer to enjoin the execution of a Federal appropriation act, on the ground that it is invalid and will result in taxation for illegal purposes, has never been passed upon by this court. In cases where it was presented, the question has either been allowed to pass sub silentio, or the determination of it expressly withheld. * * * The case last cited came [fol. 22] here from the court of appeals of the District of Columbia, and that Court sustained the right of the plaintiff to sue by treating the case as one directed against the District of Columbia, and therefore subject to the rule frequently stated by this Court, that resident taxpayers may sue to enjoin an illegal use of the moneys of a municipal corporation. * * * The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate, and the remedy by injunction to prevent their misuse is not inappropriate. It is upheld by a large number of state cases and is the rule of this court. * * * Nevertheless, there are decisions to the contrary. The reasons which support the extension of the equitable remedy to a single taxpayer in such cases are based upon the peculiar relation of the corporate taxpayer to the corporation, which is not without some resemblance to that subsisting between stockholder and private corporation. * * * But the relation of a taxpayer of the United States to the Federal government is very different. His interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of

others; is comparatively minute and indeterminable; and the effect upon future taxation of any payment out of the funds so remote, fluctuating, and uncertain that no basis is afforded for an appeal to the preventive powers of a court of equity.

"The administration of any statute likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public, and not of individual, concern. If one taxpayer may cham- [fol. 23] pion and litigate such a cause, then every other taxpayer may do the same, not only in respect to the statute here under review, but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained. It is of much significance that no precedent sustaining the right to maintain suits like this has been called to our attention, although, since the formation of the government, as an examination of the acts of Congress will disclose, a large number of statutes appropriating or involving the expenditure of moneys for non-Federal purposes have been enacted and carried into effect.

"The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary, the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other, and neither may control, direct, or restrain the action of the other. We are not now speaking of the merely ministerial duties of officials. * * * We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the contro- [fol. 24] versy. It amounts to little more than the negative power to disregard an unconstitutional enactment,

which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented, the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding. Here the parties plaintiff have no such case. Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department—and authority which plainly we do not possess."

The rule held to apply in the affairs of the Federal government should apply with equal, if not greater, force in the affairs of a sovereign state.

The interest of relators as patrons of the public schools is too remote, indirect, and indeterminate to enable them to sue to enjoin a state officer from the disposition of state funds.

The rule nisi issued herein is recalled and set aside and the application for injunction denied.

(Signed) Geo. K. Favrot, Judge Nineteenth Judicial District.

Baton Rouge, La., August 28, 1928.

[fol. 25] IN SUPREME COURT OF LOUISIANA

APPLICATION OF EMMETT COCHRAN ET AL. FOR WRITS OF MANDAMUS, PROHIBITION, AND CERTIORARI IN CAUSE NO. 29,557, EMMETT COCHRAN ET AL. VS. LOUISIANA STATE BOARD OF EDUCATION ET AL.

To the Honorable the Supreme Court of the State of Louisiana:

The petition of the State of Louisiana on the relation of Emmett Cochran, William M. Guice, Jr., Henry G. Steinau

and Allie H. Tarver, all residents of Caddo Parish, Louisiana, with respect represents:

1

That relators are plaintiffs in the suit entitled Emmett Cochran et als. vs. Louisiana State Board of Education et als., being No. 3578 on the Docket of the Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana, in which relators seek to obtain a preliminary injunction and finally a permanent injunction to restrain and prohibit the defendants, Louisiana State Board of Education, Thomas H. Harris, State Superintendent of Education, L. B. Baynard, Auditor of Public Accounts, and H. B. Connor, Treasurer, of the State of Louisiana, from using, expending or contracting to expend any of the Severance Tax Fund of the State of Louisiana to purchase and supply school books free of cost to the school children of the State of Louisiana, and to restrain and prohibit said defendants from taking any action whatever under Acts 100 and 143 of the Legislature of Louisiana for the year 1928.

2

That the aforesaid suit was submitted to the Honorable George K. Favrot, Judge of the Nineteenth Judicial District Court, on Friday, August 24, 1928, on application for a writ of preliminary injunction. The case was submitted on plaintiffs' petition, a certified copy of which is hereto attached and made part hereof, the answer or return thereto by the defendants, a certified copy of which is hereto attached and made part hereof, and on certain affidavits and exhibits filed by both plaintiffs and defendants in pursuance to the provisions of Act 29 of 1924, of the Louisiana Legislature, under which the case was tried.

3

That the respondent Judge, the Honorable George K. Favrot, on the 28 day of August, 1928, rendered judgment in favor of defendants and against plaintiffs, your rela- [fol. 26] tors, dismissing the suit, recalling the Rule Nisi

theretofore issued, and denying the preliminary injunction prayed for.

4

That your relators have taken a devolutive appeal from said judgment, according to the provisions of Act No. 29 of 1924, but this remedy affords no adequate relief to your relators, because before a hearing can be had on said appeal, the defendants and respondents will proceed to the purchase and distribution of school books free of cost to the school children of the State of Louisiana, illegally expending therefor monies out of the Severance Tax Fund of the State of Louisiana, as provided by Acts 100 and 143 of 1928, there being no order from any court of competent jurisdiction restraining them from so doing, all of which will result in irreparable injury to your relators.

5

That, therefore, the only effective remedy left to your relators is to invoke the supervisory jurisdiction of this Honorable Court, under a writ of certiorari, and to obtain from this Honorable Court an order of preliminary injunction, which remedy has been approved and pointed out by this Honorable Court in the cases of Hofman-Olsen Inc. vs. Northern Lumber Manf. Co., 160 La. 849, and Wachsen vs. Commission Council of Lake Charles, 162 La. 823.

6

That relators are citizens and taxpayers of the State of Louisiana, being the owners of both real and personal properties, located within the State, upon which they pay the State of Louisiana and political subdivisions thereof State, Parish, Road and Public School Taxes for the support and maintenance of the public school system of the State of Louisiana; that relators are patrons of the public school system of the State of Louisiana, each having one or more children who have been, are now, and will continue for several years hereafter to be enrolled in attendance in the public schools of the parish and community in which your relators live and reside.

7

That Act 100 of the Legislature of Louisiana for the year 1928, being one of the Acts under which said defendants are [fol. 27] acting and preparing to act, provides for the distribution and expenditure of the funds realized from the collection of severance taxes, (provided by Act 140 of 1922 of the Legislature of Louisiana) in an indefinite amount, but sufficient, if available, to supply school books free of cost to all school children of the State of Louisiana, which necesarily includes books free of cost for children attending private, sectarian, religious and other schools which constitute no part of the public educational system of the State of Louisiana, but which are especially and expressly excluded therefrom by the Statutes and by the Constitution of this State.

8

Your petitioners show that few, if any, of the school children of the State of Louisiana are inmates of public charitable institutions conducted under State Authority; that few, if any, of the parents, patrons, tutors or guardians of the school children of the State of Louisiana are subjects of charity or benevolence; that patrons, parents, guardians and tutors of the school children of this State are amply able to provide the necessary school books for the school children for whom they are responsible; and that the parents, patrons, guardians and tutors of the school children attending private, religious, sectarian or other schools not embraced in the educational system of the State of Louisiana are able to pay and do pay a tuition or other fees or charges to said schools.

9

That the courses of study and the school books prescribed by the private, religious and other schools aforesaid not embraced in the public educational system of the State of Louisiana, are different from those prescribed and used in the free public schools of this State, and the Louisiana State Board of Education has no right or authority to prescribe the courses of study or the school books to be used

by the children attending the schools constituting no part of the public educational system of the State, and petitioners show that there is a large number of such private and sectarian or denominational schools in the State of Louisiana where religious instruction is included in the course of study, and many of the school books selected, used and required in such schools are designed and employed to aid and promote the religious beliefs, and to [fol. 28] foster and encourage the principles of faith, and to teach the tenets of the creed, mode of worship, and ecclesiastical polity of the respective churches under whose respective control the said schools are conducted.

10

That the amount of taxes paid by your petitioners and each of them for the support of the public educational system of the State of Louisiana greatly exceeds the amount or the value of the books that would be allotted to them as patrons of the public school system and to their children who are in attendance in the free public schools of this State.

11

That Act 100 of 1928 provides that the public monies, known as the Severance Tax Fund, shall first be applied to the purchase and distribution of school books free of cost to all school children of the State, which will mean the expenditure of a large portion of said fund in aid of private persons and institutions, the balance, if any, to be devoted to the support of public education; and if the provisions of said Act, as well as of the provisions of Act 143 of 1928, for the giving and donation of school books to all school children are carried out, there will be diverted for private and illegal purposes a large portion of said fund which would otherwise be devoted to the support of the free public schools of the State, of which your petitioners are patrons, and for the support of which they pay taxes; all of which will result in irreparable injury to your petitioners.

12

That the local cost of administration of said Acts above referred to will have to — borne by the various parish

school boards, as nothing whatever was set aside in said Acts for administration, and thus again there will be illegally diverted from said Parish School Funds a large amount of money, to which Parish School Funds your petitioners contribute as taxpayers both in State and Parish School Taxes, constituting public funds for private and sectarian and illegal purposes which would otherwise be devoted for the support of the free public schools within said parishes; all to the irreparable injury to your petitioners.

[fol. 29] 13

That said Acts Nos. 100 and 143 of 1928 provide for the purchase and distribution of school books out of the Severance Tax Fund free of cost to the school children of the State of Louisiana but do not provide for the return of said books to the State of Louisiana by the said school children to whom they are distributed after they have completed and finished the study of said books, nor do they provide for the indemnification of the State in case of the loss or destruction or injury of said books by said school children or any of them. Your, petitioners, show, therefore, that said Acts provide for the pure and simple donation of said books by the State to said school children, which is wrongful and illegal and unconstitutional.

14

The basis of plaintiffs' suit is as follows:

That said Act 100 of 1928, or so much thereof as provides for the purchase and distribution of school books, is contrary to the public policy of the State of Louisiana, and is unconstitutional, null and void, for the following reasons, to-wit:

(a) That the expenditure of said public monies as aforesaid for such illegal purposes is the taking of your petitioners' property for a private purpose without due process of law and contrary to guaranteed republican form of government, in violation of Section 2 of Article I of the Constitution of Louisiana, and in violation of Section 4 of Article

IV and of the 14th Amendment of the Constitution of the United States.

(b) That said Act violates Section- 1 and 10 of Article IV of the Constitution of Louisiana in that it attempts to draw money from the public treasury without a specific appropriation therefor by law, and for a specific amount, and further violates Section 1 in that it attempts to draw money from the public treasury for a longer term than two years.

(c) That said Act violates Section 8 of Article IV of the Constitution of Louisiana in that it authorizes the taking of money from the public treasury for the purpose of teaching religion, and is in aid of churches, sects, or denominations of religion, which is also in violation of Section 4 of Article I of the Constitution of Louisiana; that said act further violates Section 8 of Article IV of the Constitution of Louisiana in that it provides for the expenditure and distribution of public funds for private, charitable, or benevolent purposes to private persons and institutions.

(d) That said Act violates Section 12 of Article IV of the Constitution of Louisiana in that it loans or grants to private persons, associations, corporations and institutions funds, credit, property, or things of value of the State of Louisiana.

(e) That said Act violates Section 13 of Article XII of the Constitution of Louisiana in that it attempts to use public funds for the support of private or sectarian schools.

[fol. 30] Second. That the Act No. 143 of 1928, in so far as it attempts to make two appropriations "Out of the Severance Tax Fund," of $750,000.00 for the years 1928-29 and 1929-30, for the purchase and distribution of free school books for all the school children of the State, is unconstitutional, null and void, for the following reasons, to-wit:

(a) That said act is violative of Section 16 of Article III of the Constitution of Louisiana, in that there is nothing in the title of said Act indicative of the object of said Act.

(b) That said Act violates Section 8 of Article IV of the Constitution of Louisiana in that it pretends to appropriate

money from the State Treasury for private, charitable, or benevolent purposes to private persons and institutions.

(c) That said Act violates Section 9 of Article IV of the Constitution of Louisiana in that such appropriations are for purposes other than those which by said Section may be embraced in the general appropriation bill.

(d) That such appropriations violate Section 10 of Article IV of the Constitution of Louisiana in that they are not for a specific purpose or for a specific amount.

(e) That said appropriations are violative of Section 1 of Article XII of the Constitution of Louisiana in that such appropriations cover all schools, private as well as public.

(f) That such pretended appropriations are violative of Section 13 of Article XII of the Constitution of Louisiana in that they authorize the using of public funds for the support of private or sectarian schools.

(g) That said appropriations amount to the taking of petitioners' property for private purposes without due process of law and contrary to guaranteed republican form of government in violation of the aforesaid provisions of Section 2 of Article I of the Constitution of Louisiana, and in violation of Section 4 of Article IV and the 14th Amendment to the Constitution of the United States.

Third. That both of said acts are unconstitutional, null and void in that they provide for the expenditure and appropriation of said funds, this to be effected and expended by the State Board of Education, and are therefore, in violation of Section 14 of Article XII of the Constitution of Louisiana, which requires that school funds, such as realized from the Severance Tax, shall be distributed to each parish in proportion to the number of children therein between the ages of six and eighteen years, for the benefit of such children of the free public, their guardians and parents, including your petitioners.

15

Relators aver that as taxpayers and citizens of the State of Louisiana and as patrons of the free public school system of the State of Louisiana, as hereinabove alleged, they

have a common interest in the prosecution of this suit to enjoin the wrongful use and distribution of *of* public funds, [fol. 31] including taxes paid by them, in violation of constitutional limitations and prohibitions, and that the subject matter of this suit exceeds $2,000.00, exclusive of costs and interest.

16

That relators are entitled to a preliminary writ of mandamus on the Honorable George K. Favrot, Judge of the 19th Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana, ordering him to issue the preliminary injunction prayed for in the petition of relators in the trial court or alternative writs of certiorari and mandamus and such other relief as, in the opinion of this Honorable Court, relators are entitled.

17

Relators have given notice to the Honorable George K. Favrot, Judge of the 19th Judicial District Court, to Louisiana State Board of Education, Thomas H. Harris, State Superintendent of Education, L. B. Baynard, Auditor of Public Accounts, and H. B. Conner, Treasurer, respondents herein, of their intention to apply to the Honorable Supreme Court of the State of Louisiana for the issuance of said writs.

18

There is attached hereto and made part of this petition certified copies of petition, answer and return, opinion and judgment of the trial Judge in said suit No. 3578, entitled Emmett Cochran et als. vs. Louisiana State Board of Education et als., on the Docket of the 19th Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana, and copy of brief of authorities filed by relators in trial court.

Wherefore relators pray that, this petition and the affidavits hereto and the annexed documents considered, a peremptory writ of mandamus issue herein, directed to the Honorable George K. Favrot, Judge of the 19th Judicial District Court in and for the Parish of East Baton Rouge,

State of Louisiana, ordering him to forthwith issue a preliminary injunction as prayed for by relators in their petition in the Suit No. 3578, on the Docket of said Court, styled Emmett Cochran et als. vs. Louisiana State Board of Education et als., upon relators furnishing bond in such amount as said judge shall fix, conditioned as the law requires, and to proceed to a trial of said case on its merits.

Relators further pray, in the alternative, that alternative writs of certiorari and mandamus issue herein to the said [fol. 32] respondent Judge in the manner provided by law, directing that a preliminary injunction issue as prayed for by the relators in the said suit of Emmett Cochran et als. vs. Louisiana State Board of Education, et als., according to law, and, in the alternative, requiring said respondent judge to send up the record in this case and to show cause to the contrary on a day and hour to be fixed by this Honorable Court, and that in the meantime this Honorable Court issue an order restraining and prohibiting the other respondents, above named, namely, Louisiana State Board of Education, L. B. Baynard, Auditor of Public Accounts, and H. B. Conner, Treasurer, from performing or carrying out any of the acts sought to be restrained by said preliminary injunction and from purchasing and supplying or contracting or negotiating for the purchasing and supplying of school books free of cost to the school children of the State of Louisiana and from taking any action whatever under Acts 100 and 143 of the Legislature of Louisiana for the year 1928.

Relators further pray for all orders and decrees necessary for costs and general and equitable relief.

Galloway & Johnson, Attorneys for Relators.

[fol. 33] *Duly sworn to by William M. Guice, Jr., and Henry G. Steinan. Jurat omitted in printing.*

[fol. 34] IN SUPREME COURT OF LOUISIANA

No. 29557

EMMETT COCHRAN et al.

vs.

LOUISIANA STATE BOARD OF EDUCATION et al.

In re Emmett Cochran et al. Applying for Writs of Mandamus, Prohibition and Certiorari

OPINION—Oct. 2, 1928

Write refused, as relators are without interest in the controversy. Sutton vs. Buie, 136 La. 234; Massachusetts vs. Mellon, 262 U. S. 486, 489, 67 L. Ed. 1078, 1084, 1085; Borden et al. vs. Louisiana State Board of Education, No. 29,540.

(Signed) J. R. L., H. F. B., St. Paul, W. O.

O'Niell, C. J., and Rogers and Thompson, J. J., dissent from the refusal to grant the writ.

[fol. 35] IN SUPREME COURT OF LOUISIANA

29579

EMMET COCHRAN et al.

vs.

LOUISIANA STATE BOARD OF EDUCATION et al.

Appeal from the Nineteenth District Court, Parish of East Baton Rouge, George K. Favrot, Judge

OPINION—June 17, 1929

OVERTON, J.:

The issues presented in this case are the same, in all essential respects, as those this day decided in the case of Silas P. Borden et al., No. 29,569 of the docket of this court, the only difference between the two cases being that plain-

tiffs besides suing as citizens and taxpayers, are also suing as patrons of the public schools.

For the reason given in the case of Silas P. Borden et al. v. Louisiana State Board of Education, the judgment of the trial court refusing to issue the injunction, is affirmed.

O'Niell, C. J. Dissents.

Rogers, J., concurs in the opinion overruling exception of no right of action; otherwise dissents.

Thompson, J., concurs in opinion overruling exception of no right of action and otherwise dissents and concurs in dissenting opinion of Mr. Justice Rogers.

[fol. 36] IN SUPREME COURT OF LOUISIANA

No. 29569

SILAS P. BORDEN et al.

v.

LOUISIANA STATE BOARD OF EDUCATION et al.

Appeal from the Nineteenth District Court, Parish of East Baton Rouge, George K. Favrot, Judge

OPINION—June 17, 1929

OVERTON, J.:

This suit is an attack upon the constitutionality of Acts 100 and 143 of 1928, in so far as those acts relate to, or appropriate money for, the purchase of school books for the use of the school children of this state. The relief asked for is that these acts be declared unconstitutional and that the Louisiana State Board of Education, the Auditor of Public Accounts, the State Treasurer, and the State Superintendent of Public Education be enjoined from using the money appropriated by the acts for the purchase of school books.

The plaintiffs are citizens and taxpayers of this state, and prosecute this suit as such. Act 100 of 1928, which is one of the acts attacked by them, omitting its title, reads as follows:

"Section 1. Be it enacted by the Legislature of Louisiana, That the Severance Tax Fund of the State, as levied by Act 140 of 1922, as amended, shall be devotel after allowing funds and appropriations as provided by the Constitution of the State, first, to supplying school books to the school children of the State of Louisiana, and that thereafter such further sums as remain in the said Severance Tax Fund shall be transferred to the State public school funds.

"Sec. 2. That the State Board of Education of Louisiana shall provide the said school books for school children free of cost to such children out of said tax fund, and thereafter apply the remaining sums out of the said Severance Tax Fund to the State public school funds.

"Sec. 3. That this act shall not apply to persons attending colleges and universities."

Act 143 of 1928, the last of the two acts attacked, is the General Appropriation Act. After making various appropriations for the fiscal years 1928-29 and 1929-30, out of the [fol. 37] general revenues of the State, and after making certain appropriations out of the Severance Tax Fund, the act, (See page 188 of the Acts of 1928), appropriates out of that fund $750,000 for each of those years, the appropriations to be used for the following purpose, to wit:

"For purchase of free school books for the use of school children of this State, to be expended by the State Board of Education of Louisiana as provided by House Bill No. 90 of 1928 [Act 100 of 1928], or so much thereof as may be necessary."

After making the appropriations for school books, the act then provides that the balance of the Severance Tax Fund shall be transferred to the Current School Fund as provided by House Bill No. 90 of 1928, which is Act 100 of 1928, quoted above.

The title of the act making the foregoing appropriations is: "An act making an appropriation to defray the ordinary expenses of the Government; to pay the interest on the public debt; and to support public schools and public charities in the State of Louisiana; to build and repair

public levees; to maintain the State Penitentiary and other State departments for the year commencing July 1st, 1928, and ending June 30th 1929, and for the year commencing July 1st, 1929, and ending June 30th 1930."

The constitutionality of the two acts under consideration is attacked on various grounds, so far as the acts relate to, or provide for, the purchase and distribution of school books. The pleas of unconstitutionality are leveled in the pleadings against each act separately, with the result that some grounds of attack that might have been leveled specifically against both acts are leveled only against Act 100. Plaintiffs, in their brief, however, have considered that, where the pleas are applicable to both acts, they were intended to apply to both, and have so treated them. Defendants have apparently acquiesced in this. In view of this acquiescence, and in view of the fact that the two acts are very closely related, we shall consider that, where a plea is applicable to both acts, and is so discussed in the briefs, it was so intended to apply, and shall state the case accordingly.

Plaintiffs urge that Act 100, in so far as it relates to the purchase of school books, contravenes Sections 1 and 10 [fol. 38] of Article 4 of the Constitution of 1921, in that it attempts to draw money from the public treasury without a specific appropriation therefor, and also contravenes Section 1 of that article, in that it attempts to draw money from the public treasury for a longer term than two years.

Plaintiffs also urge that Act 143 of 1928, so far as relates to the appropriation of money for school books, contravenes Section 16 of Article 3 of the Constitution, in that the title of the act has nothing in it indicating the intention to make appropriations for the purchase of such books, and that the act also contravenes Section 9 of Article 4 of the Constitution, in that the appropriations for the purchase of school books are for a purpose other than any of those which by said section may be embraced in the General Appropriation Bill.

Plaintiffs also urge that both of the foregoing acts, so far as they relate to the purchase and distribution of school books, contravenes Section 8 of Article 4 and Section 4 of Article 1 of the Constitution, in that they autho-

rize and provide for the expenditure and distribution of public funds for private, charitable or benevolent purposes to private persons and institutions, and in that they authorize the taking of money from the public treasury for the purpose of teaching religion and are in aid of churches, sects or denominations of religion; that they violate Section 12 of Article 4 of the Constitution, in that they lend or grant to private persons, associations, corporations, and institutions funds, credit, property, or things of value, belonging to the state; that they violate Section 13 of Article 12 of the Constitution, in that they attempt to use public funds for the support of private and sectarian schools; and that they violate Section 14 of Article 12 of the Constitution, relating to the distribution of public school funds.

Based upon the foregoing allegations of unconstitutionality, plaintiffs close their attack upon the acts by alleging that the expenditure of the severance tax for such illegal purposes is the taking of their property for private purposes, without due process of law, in contravention of Section 2 of Article 1 of the Constitution of this state, and [fol. 39] of the 14th Amendment of the Constitution of the United States, and is an act contrary to the republican form of government, guaranteed to each state by Section 4 of Article 4 of the Constitution of the United States.

Defendants urge that plaintiffs fail to disclose a right of action. This contention rests upon the ground that a citizen and taxpayer has no standing as such to contest the expenditure of the funds of the state under an alleged unconstitutional statute, and that, even if it were otherwise, plaintiffs do not disclose wherein they would suffer irreparable injury by the expenditure of the money appropriated for the purpose of school books. The members of the court are divided on this question. Four members thereof, namely, the Chief Justice, and Justices Land, Rogers and Thompson are of the opinion that plaintiffs, as tax payers, have a right of action to contest the expenditure of public funds, belonging to the state, under an alleged unconstitutional statute. The members of the court, so thinking, are of the opinion that the case of Donalson v. Police Jury, on rehearing, 161 La. 480, 109 So. 38, and the decisions there cited, are controlling in this case. On the other hand, Justices St. Paul and Brunot, and the writer of this opinion think that plaintiffs, as taxpayers,

have no right to prosecute this suit, or in other words, that they have no right of action. In their view Donalson v. Police Jury is not pertinent here, since it did not involve the funds of the state. In their opinion the question should be decided according to the principles laid down in the case of Sutton v. Buie, 136 La. 234, 66 So. 956, and Massachusetts v. Mellon, 262 U. S. 447, 43 Sup. Ct. 597, 67 L. Ed. 1078. However, the four members of the court, who think that a right of action is disclosed, are of the opinion that Massachusetts v. Mellon is not appropriate here, as it has reference to a taxpayer of the United States, and that the case of Sutton v. Buie, so far as it maintains that a taxpayer has no right of action in a case like this, is contrary to the great weight of authority and should not be followed. Many of the cases relied on by these members of the court, as showing the weight of authority, may be found in the annotations to Sutton v. Buie, L. R. A., 1915 D. 178. From [fol. 40] the foregoing, it is obvious that a majority of the court are of the opinion that plaintiffs disclose a right of action. Therefore, the plea that plaintiffs disclose no right of action is overruled.

The overruling of this plea makes it necessary to consider the pleas of unconstitutionality directed against the two statutes by plaintiffs. The contention that Act 100 of 1928 violates Sections 1 and 10 of Article 4 of the Constitution, relative to the manner of making appropriations and fixing a limit upon the time for which appropriations may be made, is not well founded, for the simple reason that Act 100 is not, and does not purport to be, an appropriation act. It does not authorize the drawing of anything from the treasury. It merely dedicates a part of the Severance Tax Fund, without even specifying the amount, to the purchase of school books. Standing alone the act could have no practical effect, save as a basis for specific appropriations. That such an act is not an appropriation act, but merely an act of dedication, see Fisher v. Steele, Auditor, 39 La. Ann. 447; Board of Adminstrators v. Richhardt, 139 La. 446, 71 So. 735; Lionel's Cigar Store v. McFarland, Supervisor, 162 La. 956, 111 So. 341. Since the act is not an appropriation act, it was unnecessary that the Legislature, in passing it, comply with the constitutional provisions relative to the making of appropriations, by

making them for specific purposes and specific amounts and for a period not exceeding two years.

The contention that Act 143 of 1928 contravenes Section 16 of Article 3 of the Constitution, because the title of the act fails to indicate the intention of making the appropriations for the purchase of school books, presents the next question for consideration. We have quoted the title of the act in stating the case. In considering the question presented, it should be borne in mind that we are passing upon the sufficiency of the title of the General Appropriation Act, and that every reasonable presumption, supporting the sufficiency of the title is peculiarly entitled to application, and this, though the sustaining of the plea, in the present instance, would result in declaring null only [fol. 41] the appropriations for the purchase of school books. The title of the act is similar to the titles usually used in General Appropriation Acts in this State, and in fact, follows the Constitutional requirements as to what may be contained in such acts. We think that the title, suffices to cause one to anticipate that, upon investigation, some such appropriations may be found in the body of the act. We, therefore, conclude that the title is sufficient.

The next question to be considered is whether the appropriations for the purchase of school books are such appropriations as may be included in the General Appropriation Act. Section 9 of Article 4 of the Constitution reads that "the General Appropriation Bill shall embrace nothing but appropriations for the ordinary expenses of the government, pensions, the public debt and interest thereon, public schools, public roads, public charities and all state institutions; and such bill shall be so itemized as to show for what account each and every appropriation shall be made. All other appropriations shall be made by separate bills, each embracing but one object." The purpose of this provision is to prevent the encumbering of the General Appropriation Bill with all kinds of appropriations, thus simplifying it, and thereby reducing the chances of making ill-considered appropriations in the confusion that might otherwise arise, and preventing the retarding of the bill by protracted discussions over matters that more properly should be separately considered. While the provision possesses substantial reasons for its existence, yet consideration should be given the judgment of

the Legislature as to what may properly come within it. The Legislature evidently considered that the appropriations for the purchase of school books were sufficiently connected with the ordinary expenses of government to justify their inclusion in the General Appropriation Act. The purpose had in view, in making the appropriations—that of reducing and, if possible, of obliterating illiteracy in this state—was a purpose in which the state was vitally interested, and the necessity for the continuance of the appropriations to accomplish that end was such as to give reasonable grounds to consider the matter an ordinary obligation and expense of government. We are not prepared [fol. 42] to say that the Legislature erred in so treating the matter.

We may consider together the objections urged against both acts to the effect that they violate Section 8 of Article 4, Section 4 of Article 1, Section 13 of Article 12, and Section 12 of Article 4 of the Constitution.

Section 8 of Article 4 prohibits, among other things, the taking of money from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher of religion as such, or for private, charitable, or benevolent purposes to any person or community, excepting certain institutions conducted under state authority. Section 4 of Article 1 relates to the right to worship God according to the dictates of one's own conscience, and prohibits the passage of laws establishing religion, or the free exercise thereof, or the granting of preferences to, or making discriminations against, any church, sect, or religious creed. Section 13 of Article 12 prohibits the using of public funds for the support of any private or sectarian school. Section 12 of Article 4 prohibits, among other things, the lending, pledging or granting the funds, credit, property or things of value of the state or of any political corporation thereof to or for any person or persons, association or corporation, public or private.

In our opinion, which is the view of the majority of the court, these acts violate none of the foregoing constitutional provisions. One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian, or even public school. The appropriations were made for

the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or nonsectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these ap- [fol. 43] propriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries. It is also true that the sectarian schools, which some of the children attend, instruct their pupils in religion, and books are used for that purpose, but one may search diligently the acts, though without success, in vain in an effort to find anything to the effect that it is the purpose of the state to furnish religious books for the use of such children. In fact, in view of the prohibitions in the Constitution against the state's doing anything of that description, it would be legally impossible to interpret the statute as calling for any such action on the part of the state, for where a statute is susceptible of two constructions, one of which makes it unconstitutional and the other constitutional, the interpretation making it constitutional must be adopted. What the statutes contemplate is that the same books that are furnished children attending public schools shall be furnished children attending private schools. This is the only practical way of interpreting and executing the statutes, and this is what the State Board of Education is doing. Among these books, naturally, none is to be expected, adapted to religious instruction.

As relates to the contention that the statutes violate Section 12 of Article 4 of the Constitution, we do not find this contention well founded. The school books are not granted or donated to the children. The donating of them would have been unnecessary to the accomplishing of the purpose of the statutes. It is only the use of the books that is granted to the children, or, in other words, the books are lent to them, which implies that they are to be returned. While it is true that there is a lending here of things of value, belonging to the state, still this lending is not the lending prohibited by the Constitution. The lending there

contemplated is a lending, not connected with the reasonable exercise of the police power. Where the granting or lending of anything of value, belonging to the state, or any political corporation thereof, is necessary in the reasonable exercise of the police power, Section 12 of Article 4 of the Constitution was not intended to prevent the granting or [fol. 44] lending. Were it otherwise, the state, or a municipal corporation, could not furnish, for instance, vaccine for the prevention of an epidemic. In fact, the Constitution presupposes the existence of the police power and is to be construed with reference to that fact. 12 C. J., Sec. 415, p. 907; 6 R. C. L., Sec. 193, p. 195. The furnishing of school books to the children of the state, for their use, in attending school, tends directly to promote the education of the children of the state and to obliterate illiteracy, thereby improving the morals of the children and promoting the general welfare and safety of the people, and hence comes within the police power. Cf. Barbier v. Connerly, 113 U. S. 27, 28 L. Ed. 923. Our conclusion is that the foregoing pleas, directed against both acts, should be overruled.

The next plea to be considered is that both acts contravene Section 14 of Article 12 of the Constitution. This section defines what the public school funds of the state shall consist of, and provides that such funds, with the exception of poll taxes and the interest on proceeds of lands granted by the United States for the support of public schools, shall be distributed to each parish in proportion to the number of children therein between the ages of six and eighteen years. The contention is that the parish school boards are, by this section of the Constitution, the proper distributing agencies of all school funds, excepting poll taxes and the interest on the proceeds of land, and not the State Board of Education. From this, plaintiffs draw the conclusion that the State Board of Education is not the proper agency under the Constitution to expend public school funds for school books. The answer to this is that the severance taxes, from which the appropriations were made, were not a part of the public school fund. They might have been made a part of it by the Legislature, but they were not. This plea should be overruled.

The last question to be considered is that the act violates the due process clauses of the Constitutions of this

state and of the United States, and also Section 4 of Article 4 of the Constitution of the United States. The contention, as to the violation of the due process clauses, is based on the ground that taxes may neither be levied nor expended [fol. 45] for any but a public purpose, and that to do either for any but such a purpose amounts to a taking of property without due process of law. It suffices to say that we do not understand that plaintiffs question the legality of the levy, but they do question the legality of the proposed expenditure. We have found, however, that the taxes, here appropriated, are to be spent legally for a public purpose, and this, we think, disposes of the question here presented. As to the violation of Section 4 of Article 4 of the Constitution of the United States, it is certainly difficult, and we think impossible, to see how the expenditure of public funds for text books for the use of the children of the state has any tendency to destroy the republican form of government, enjoyed by this state. However, the question here presented is a political one, which does not fall within the jurisdiction of the courts. Pacific States Telph. & Teleg. Co. v. Oregon, 223 U. S. 118, 56 L. Ed. 377, 32 Sup. Ct. 224; South Dakota ex rel. Wagner v. Summers, 144 N. W. 730, 50 L. R. A. (N. S.) 206.

The trial judge refused to issue the injunction herein, and rendered judgment accordingly. His decree should be affirmed.

For the reasons assigned the judgment appealed from is affirmed.

[fol. 46] O'Niell, C. J., dissents for the reasons given by Mr. Justice Rogers.

Rogers, C. J., concurs in overruling exception of no right of action, but otherwise dissents and hands down reasons.

Thompson, J., concurs in opinion overruling exception of no right of action; otherwise dissents and concurs in dissenting opinion of Justice Rogers.

[fol. 47] IN SUPREME COURT OF LOUISIANA

No. 29569

SILAS P. BORDEN ET ALS.

VS.

LOUISIANA STATE BOARD OF EDUCATION ET AL.

OPINION

ROGERS, J. (concurring in part and dissenting in part):

As stated in the majority opinion, I concur in the majority view that the plaintiffs as taxpayers have a right to judicially contest the expenditure of the funds of the state under the alleged unconstitutional legislative acts, but I dissent from the majority view that the acts themselves are not unconstitutional. My opinion is, that they are flagrantly unconstitutional in several particulars. The prohibitory clauses of the constitution violated by the statutes are couched in words so plain and unambiguous that he who runs may read them.

1st. Act 143 of 1928 so far as it purports to appropriate the sum of $750,000 for the purpose of free school books for the use of the school children of the state is plainly violative of Section 16 of Article 3 of the state constitution. The constitutional provision requires that every legislative act shall have but one object and shall have a title indicative of such object. There is nothing in the title to the statute under discussion which meets the constituitonal requirement. The statutory title so far as it is pertinent to the discussion reads: "An act making an appropriation to defray the ordinary expenses of government * * *; and to support *public schools* * * *." (Writer's italics.)

The argument advanced in the majority opinion overruling this contention of the plaintiffs is, that the title to the act is similar to titles usually used in General Appropriation Acts in this state, and is sufficient to cause one

to anticipate that, upon investigation some such appropriation may be found in the body of the act.

I admit that the title is similar to titles usually used in General Appropriation Acts but I assert that no prior General Appropriation Act to which such title is appended contains an appropriation for the purpose of purchasing [fol. 48] free school books for *all* the children of the state. Therefore, I respectfully suggest that the argument on the point in the majority opinion is inapplicable to the issue presented by plaintiffs' contention. Nor can I agree with the majority view, that the title, "suffices to cause one to anticipate that, upon investigation, some such appropriations may be found in the body of the act." For my own part, I think the title suggests the contrary view, namely, that it is such as to cause one to anticipate that, upon investigation, only appropriations for the support of the *public schools* will be found in the body of the act. That is what the title in plain words says, viz.: "An act making an appropriation * * * to support the *public schools.*" (Writer's italics.) Whatever else the title may indicate concerning the appropriations made by the statute for other purposes, so far as the appropriations for schools are concerned, it seems to me to be too clear for argument that the statutory title not only indicates but expressly declares that they are made for the support of the public schools, and for the public schools alone. This being the case, the appropriation by the statute for the purchase of free school books for the use of school children, meaning all school children in public, private or sectarian schools, of the state goes far beyond the object set forth in the statutory title.

2nd. Act 143 of 1928 so far as the appropriation under review is concerned is clearly violative of Section 9 of Article 4 of the state constitution. The section and article provides:

"The general appropriation bill shall embrace *nothing but* appropriations for the ordinary expenses of the government, pensions, the public debt and interest thereon, *public schools,* public roads, public charities and all State institutions." (Writer's italics.)

A mere reading of the quoted provision discloses that, whether the appropriation be for all schools, public, private and sectarian, or for the children of such schools, the item complained of by plaintiff is not for any of the purposes or objects enumerated therein. The item is therefore illegally incorporated into the general appropriation bill. [fol. 49] The argument that the appropriation falls within the ordinary expenses of the government is, I respectfully suggest, unsound. Such expenses are merely those that are usually and customarily incurred in the regular administration of the governmental affairs. The appropriation in question is the first in the history of the state, so far as I am informed, that has been made by the legislature to purchase school books for all the children of the state. It purports to dispose partially of a special fund (Severance Tax Fund) created and levied by special laws. The appropriation, in my opinion, is, therefore, an unusual, and not an usual, one, and is not such an appropriation as has been customarily made to take care of the ordinary running expenses of the state government. If the position of the majority of the court, as expressed in the majority opinion, be correct, then the exceptions set forth in the constitutional provision are superfluous and meaningless, with the single exception of appropriations for the ordinary expenses of government which would comprehend the other expenses enumerated. But the framers of the constitution ex industria discriminated between the ordinary expenses of government and the other expenses that might be included in the general appropriation bill. Among these other expenses are the expenses for public schools. If the expenses for such schools were not intended by the framers of the constitution to be included among the ordinary expenses of government, how can it be successfully contended that the expenses of all the schools of the state, necessarily including the public schools, may constitutionally be included among the ordinary governmental expenses? The question, I respectfully submit, answers itself. And the answer becomes more emphatic in the light of Section 1 of Article 12 of the constitution, providing that the educational system of the state shall consist only of free public schools and all institutions of learning supported in whole or in part by public funds.

3rd. Both statutes, Nos. 100 and 143 of 1928, clearly violate Section 8 of Article 4 and Section 13 of Article 12 of the state constitution.

Section 8 of Article 4 contains two provisions prohibit- [fol. 50] ing the withdrawal of funds from the state treasury for sectarian or private purposes, as follows, viz:

"No money shall ever be taken from the public treasury directly or indirectly in aid of any church, sect or denomination of religion, * * *.

"No appropriation from the State Treasury shall be made for private, charitable or benevolent purposes to any person or community * * *."

Section 13 of Article 12 reads as follows, viz:

"No public funds shall be used for the support of any private or sectarian school."

It does not require any extended reasoning to produce the conviction that to withdraw money from the public treasury for the purpose of purchasing books to be used in sectarian schools is to use such money "indirectly" if not "directly" in aid of the church, sect or religious denomination conducting the schools. It is obvious, also, that an appropriation from the state treasury for purchasing books to give or lend directly to all the school children, or indirectly to all the schools, of the state, is an appropriation for private or benevolent purposes.

By Section 13 of Article 12, supra, the framers of the constitution have deliberately established the public policy of the state concerning the disposition of its funds for school purposes. The language of the provision is clear and explicit, requiring no interpretation. Its intention is to preserve the school fund for the use of the public schools, by prohibiting the diversion of the fund, or any part thereof, for the support of any private or sectarian school. The wisdom and policy of the constitutional provision is no concern of the courts. Their function is confined solely to its enforcement.

The four members of the court who think that the legislative acts under rexiew are constitutional attempt to avoid the effect of the quoted provisions of the constitution by

holding that they are inapplicable, because the appropriations are made for the purpose of purchasing books for the use of the school children, with a resultant benefit to the state, and not for the schools themselves. In my [fol. 51] opinion, this holding is a mere begging of the question. The maintenance of private or sectarian schools, however valuable may be the work which they perform, is not a public purpose so as to justify the expenditure of the public money in their support. School books are as essential to the means of imparting instruction to the children as are other educational appliances, school houses and school teachers. But I do not believe that any one will contend for a moment that, in the face of the prohibitory clauses of the constitution, money can be taken from the public treasury for the purpose of furnishing the children in private and sectarian schools with these necessary educational facilities. To say the least, the appropriation of the public funds for the purchase of books for all the school children of the state is an attempt to do indirectly that which cannot be done directly. The argument of resultant benefit to the state must and does fall before the rule of public policy established in the organic law itself that the welfare of the state can be best promoted by prohibiting appropriations from the public treasury in aid of any church, religious denomination, private charitable or benevolent purpose, private or sectarian school.

4th. Another and insuperable objection to the majority view that the statutes under attack are constitutional because they provide for supplying books to the children and not to the schools is to be found in Section 12 of Article 4 of the constitution. That section so far as pertinent to the issue reads as follows, viz:

"The funds, credit, property or things of value of the state or of any political corporation thereof, shall not be loaned, pledged or granted to or for any person, or persons, association or corporation, public or private; * * *."

It is argued in the majority opinion that the constitutional provision is inapplicable to the case at bar, because the books are not granted or donated but only loaned to the

children, which may be legally done in a reasonable exercise of the police power of the state. The statutes themselves do not provide for the return or repossession of the books, nor for any indemnification of the state in the event [fol. 52] they are lost, destroyed or injured. But, be that as it may, the majority view necessarily admits that title to the books remains in the state—that they are property or things of value belonging to the state; and the constitutional provision which I have quoted in express words declares that as such they cannot be loaned to any person or persons. To say that the lending contemplated in the constitutional provision is not such a lending as will take place in case of the books supplied to the children of the state under the authority of the statute herein attacked, is, in my opinion, an inference wholly unwarranted by the language of the provision. Nor is there any room here for the application of the state's police power. That power is not absolute and cannot be invoked to sustain legislative acts which in their operation defeat the objects and purposes of the organic law. As I see it, the majority decision writes into the state constitution a provision that was not incorporated into the original instrument by the framers.

For the foregoing reasons, I think that the judgment appealed from should be annulled and that the case should be remanded with instructions to the district judge to issue the injunction prayed for by the plaintiffs.

[fol. 53] IN SUPREME COURT OF LOUISIANA

No. 29579

EMMETT COCHRAN et als.

vs.

LOUISIANA STATE BOARD OF EDUCATION et als.

MOTION FOR REHEARING—Filed June 19, 1929

Now into Court, through the undersigned counsel, come Emmett Cochran, W. M. Guice, Jr., Henry Steinau, and A.

H. Tarver, plaintiffs and appellants, and suggest to the Court that the opinion and decree rendered in this cause on the 17th day of June, 1929, is erroneous, contrary to the law and the evidence, prejudicial to the interest of appearers, and that a Rehearing should be granted in this matter for the following reasons, to-wit:

1

The Court erred in the majority opinion in holding that Act 143 of 1928, in so far as it purports to appropriate $750,000.00 for purchasing of free school books for the use of the school children of the State, does not violate Section 16 of Article III of the Louisiana Constitution.

2

The Court erred in the majority opinion in holding that the appropriation for the purchase of school books for the school children of the State of Louisiana, contained in Act 143 of 1928, are such appropriations as may be included in the general appropriation act, and in holding that said Act does not violate Section 9 of Article IV, and Section I of Article XII of the Constitution of Louisiana.

3

The Court erred in the majority opinion in holding that Acts 100 and 143 of 1928 are not in contravention of Section 8 of Article IV, Section 4 of Article I, Section 13 of Article XII, and Section 12 of Article IV of the Constitution of Louisiana, by holding that said Acts do not authorize the drawing of money from the public treasury for the purpose of teaching religion, by holding that said acts are not in aid [fol. 54] of churches, sects, and denominations of religion, and by holding that said Acts do not provide for the distribution and expenditure of public funds for private, charitable, or benevolent purposes to private persons and institutions, and in holding that said Acts do not authorize the loaning, pledging, or granting of State Funds to or for any persons or persons, associations, or corporations, public or private.

4

The Court erred in the majority opinion in holding that the State Board of Education is the proper agency for the

expenditure of the funds appropriated by Act 143 of 1928 for the purchase of free school books, rather than the respective parish school boards, and in holding that said act is not in violation of Section 14 of Article XII of the Constitution of Louisiana.

5

The Court erred in the majority opinion in holding that the Acts complained of do not authorize the taking of private property for other than public purposes, and are not in violation of a guaranteed republican form of government, and in holding, therefore, that said Acts are not violative of Sections 2 and 4 of Article I of the Louisiana Constitution, and of Section 4 of Article IV and of the 14th Amendment to the Constitution of the United States.

Wherefore appearers pray that, after due consideration, a rehearing be granted in this case, and that finally the judgment appealed from should be annulled, and that injunction issue as prayed for by appearers.

(Signed) Galloway & Johnson, Attorneys for Plaintiffs and Appellants.

We hereby certify that the above motion is filed in good faith and not for purposes of mere delay, but to secure substantial justice, and that a copy hereof has been mailed to the opposing counsel.

(Signed) Galloway & Johnson.

[fol. 55] [File endorsement omitted.]

In Supreme Court of Louisiana

No. 29579

Cochran

vs.

Louisiana State Board of Education

Order Denying Rehearing—July 8, 1929

It is ordered that the rehearing applied for in this case be refused.

[fol. 56] IN SUPREME COURT OF LOUISIANA

EMMETT COCHRAN et als., Appellants,

vs.

LOUISIANA STATE BOARD OF EDUCATION et als., Appellees

PETITION FOR APPEAL, ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed Oct. 2, 1929

PETITION FOR APPEAL

Considering themselves aggrieved by the decision of the Supreme Court of the State of Louisiana rendered on June 17, 1929, in the cause entitled Emmett Cochran et als. vs. Louisiana State Board of Education et als., No. 29,579 on the Docket of said Court, which said judgment and decision became final on July 8, 1929, when the said Supreme Court of Louisiana denied a motion for rehearing timely filed by appellants, the plaintiffs therein, Emmett Cochran, W. M. Guice, Jr., Henry Steinau and A. H. Tarver, hereby pray for an appeal to the Supreme Court of the United States therein, and for an order fixing the amount of the bond thereon.

ASSIGNMENT OF ERRORS

And the said Appellants assign the following errors in the record and proceedings in said cause:

1. That the Supreme Court of the State of Louisiana erred in holding that the purchasing and supplying of free school books by the State of Louisiana out of public tax funds in the State Treasury for the use of all the school children of the State of Louisiana, including children attending private, religious, sectarian and other schools not embraced in the public educational system of the State of Louisiana, is "an ordinary obligation and expense of government."

2. That the Supreme Court of the State of Louisiana erred in holding that the purchasing, and subsequent granting or lending, of free school books by the State of Louisiana out of public tax moneys in the State Treasury, for the

[fol. 57] use of all the school children of the State of Louisiana, including children attending private, religious and sectarian and other schools not embraced in the public educational system of the State of Louisiana, is permissible as an exercise of the police power of the State.

3. That the Supreme Court of the State of Louisiana erred in holding that the purchasing, and subsequent granting or lending, of free school books by the State of Louisiana out of public tax moneys in the State Treasury for the use of all the school children of the State of Louisiana, including children attending private, religious, sectarian and other schools not embraced in the public educational system of the State of Louisiana, is for a "public purpose" so as to authorize the expenditure therefor of State funds.

4. That the Supreme Court of the State of Louisiana erred in holding that the purchasing, and subsequent granting or lending, of free school books by the State of Louisiana out of public tax moneys in the State Treasury for the use of all the school children of the State of Louisiana, including children attending private, religious, sectarian and other schools not embraced in the public educational system of the State of Louisiana, as authorized by Acts 100 and 143 of the Legislature of Louisiana for the year 1928, does not constitute a taking of the property of plaintiffs, as taxpayers and as patrons of public schools of the State of Louisiana, without due process of law, and in holding that said acts are constitutional and not in violation of the 14th Amendment to the Constitution of the United States, petitioners raising said question of their rights under said Amendment in pleadings, trial and arguments in the original trial court, as well as in application to the Supreme Court of Louisiana for writs of certiorari and mandamus, on appeal to the Louisiana Supreme Court and on motion for a rehearing therein.

5. That the Supreme Court of the State of Louisiana erred in holding that the purchasing, and subsequent granting or lending, of free school books by the State of Louisiana out of public tax moneys in the State Treasury, for the use of all the school children of the State of Louisiana, including children attending private, religious, sectarian and [fol. 58] other schools not embraced in the public educa-

tional system of the State of Louisiana, as authorized by Acts 100 and 143 of the Legislature of Louisiana for the year 1928, is not violative of Section 4 of Article IV of the Constitution of the United States which guarantees to every state in the Union a Republican Form of Government, petitioners raising said question of their rights under said Amendment in pleadings, trial and arguments in the original trial Court, as well as in application to the Supreme Court of the State of Louisiana for writs of certiorari and mandamus, on appeal to the Supreme Court of Louisiana and on motion for a rehearing therein.

PRAYER FOR REVERSAL

For which errors the petitioners pray that the said judgment of the Supreme Court of the State of Louisiana, dated June 17, 1929, and which became final on July 8, 1929, in the above entitled cause, be reversed, and judgment rendered in favor of said petitioners, and for costs.

R. S. Benoit, James U. Galloway, Nash Johnson,
Counsel for Plaintiffs-Appellants.

[fols. 59 & 59½] IN SUPREME COURT OF LOUISIANA

EMMETT COCHRAN et als., Appellants,

vs.

LOUISIANA STATE BOARD OF EDUCATION et als., Appellees

ORDER ALLOWING APPEAL—Filed Oct. 2, 1929

The appellants in the above entitled suit, and each of them, having prayed for allowance of appeal in this cause to the Supreme Court of the United States, from the judgment made and entered in the suit entitled Emmett Cochran et als., vs. Louisiana State Board Education et als., No. 29,579 on its docket by the Supreme Court of the State of Louisiana on June 17, 1929, and made final on July 8, 1929, and from each and every part thereof, and having presented and filed their petition for appeal, assignment of errors and prayer for reversal, pursuant to the Statutes and to the

rules of the Supreme Court of the United States in such case made and provided,

It is now here ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Supreme Court of the State of Louisiana in the above entitled cause, as provided by law, and it is further ordered that the Clerk of the Supreme Court of the State of Louisiana shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit same to the Supreme Court of the United States so that he shall have the same in said Court within thirty days of this date.

And it is further ordered that security for costs on appeal be fixed in the sum of one thousand dollars ($1,000).

Dated October 2nd, 1929.

Charles A. O'Niell, Chief Justice of the Supreme Court of the State of Louisiana. (Seal Supreme Court of the State of Louisiana.)

[fols. 60 & 60½] Citation, in usual form, showing service on Percy Saint, filed October 2, 1929, omitted in printing.

[fols. 61 & 62] Bond on appeal for $1,000, approved and filed October 2, 1929, omitted in printing.

[fol. 63] In Supreme Court of Louisiana

Emmett Cochran et als., Appllants,

vs.

Louisiana State Board of Education et als., Appellees

Præcipe for Transcript of Record

The Clerk of the Supreme Court of Louisiana will please proceed to make up the transcript in the above numbered and entitled cause, including therein the following:

1. Plaintiffs' original petition.
2. Answer of Defendants.

3. Written opinion of Geo. K. Favrot, Judge Trial Court.

4. Application of plaintiffs to Supreme Court of Louisiana for Writs of certiorari and mandamus—Filed man. #29557.

5. Opinion of Supreme Court of Louisiana, dated October 2, 1928, denying application for writs.

6. Opinion of Supreme Court of Louisiana on appeal, dated June 17, 1929, together with opinion of same date in the consolidated case of Silas P. Borden et als., vs. Louisiana State Board of Education et als., No. 29569 on the Docket of the Supreme Court of Louisiana.

7. Plaintiffs' motion for re-hearing.

8. Minutes of Supreme Court of Louisiana, of date July 8, 1929, showing refusal of rehearing.

9. Petition for appeal, assignment of errors and prayer for reversal, filed by plaintiffs-appellants.

10. Order allowing appeal and fixing bond.

11. Citation of appeal with return thereon.

12. Bond of appeal with approval thereon.

13. This præcipe with return thereon.

14. Your certificate.

R. S. Benoit, James U. Galloway, Nash Johnson, Counsel for Appellants.

We hereby acknowledge service of the foregoing præcipe and attest that we have no request for additions to foregoing precipe.

Dated Oct. 2, 1929.

Percy Saint, Peyton N. Sandoz, Counsel for Appellees.

[fol. 64] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 65] Judge's certificate to clerk omitted in printing.

[fol. 66] Clerk's certificate to judge omitted in printing.

[fol. 67] IN SUPREME COURT OF UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION TO PRINT ENTIRE RECORD—Filed Nov. 12, 1929

Appellants, Emmett Cochran, W. M. Guice, Jr., Henry Steinau, et al., state that they expect to rely upon each and all of the assignments of error attached to the record filed herein.

Designation of Part of Record to be Printed.

The entire record.

Wade H. Ellis, Daniel C. Roper, W. D. Jamieson, Herbert S. Ward, James U. Galloway, Nash Johnson, Counsel for Appellants.

Wade H. Ellis.

DISTRICT OF COLUMBIA, *ss:*

Challen B. Ellis, being first duly sworn, deposes and says that on November 11, 1929, he served true copies of fore-[fol. 68] going "Statement of Points to be Relied Upon and Designation of Parts of Record to be Printed," upon Honorable Percy Saint, Attorney General, State of Louisiana, Baton Rouge, Louisiana; Messrs. White, Holloman & White, Alexandria, Rapides Parish, Louisiana; Messrs. Burke & Smith, New Iberia, Iberia Parish, Louisiana, attorney, for Appellees, by mailing said copies, respectively to each of them addressed as above; that the fact of mailing is shown by registered mail receipts hereto attached and by reference made a part of this affidavit.

Challen B. Ellis, of Counsel for Appellants.

Sworn to before me and subscribed in my presence this 12 day of November, 1929. Minerva G. Culton, Notary Public, D. C. My commission expires June 10, 1934. (Seal of Minerva G. Culton, Notary Public, District of Iberia, La.)

[fol. 69] [File endorsement omitted.]

Endorsed on cover: File No. 34,599. Louisiana Supreme Court. Term No. 468. Emmett Cochran, W. M. Guice, Jr., Henry Steinau et al., appellants, vs. Louisiana State Board of Education et al. Filed October 29, 1929. File No. 34599.

SUPREME COURT OF THE UNITED STATES

STIPULATION AND ADDITION TO RECORD—Filed Mar. 26, 1930

To the Honorable Chief Justice and Associate Justices of the United States Supreme Court:

It appearing that the official transcript of the record in this case is deficient in that it lacks certain evidence presented in the lower Court, and since it was understood by written agreement that the præcipe presented should require that the whole record go up, we respectfully present to the Court the fact that the attached affidavits submitted in this case were omitted from the record, and we, therefore, submit them for the consideration of this Honorable Court.

Percy Saint, Attorney General of Louisiana; Peyton R. Sandoy, Assistant Attorney General; White, Holloman & White, Burke & Smith, of Counsel, All Appearing for Defendants. Wade H. Ellis, Counsel for Appellants. Daniel C. Roper, W. D. Jamieson, Herbert S. Ward, James U. Galloway, Nash Johnson, of Counsel.

New Orleans, La., March 15, 1930.

STATE OF LOUISIANA,
Parish of East Baton Rouge:

Before me, the undersigned authority, personally came and appeared T. H. Harris, resident of this Parish and State, who, after being duly sworn deposed and said:

That he is State Superintendent of Public Education and Secretary of the State Board of Education, of the State of Louisiana;

That the books listed in bulletin No., 126, dated July 15th., 1928, a copy of which is attached hereto and made a part hereof, are the text books which have been adopted by the State Board of Education and all of which are covered by contracts with the publishers for use in the public schools of the State, except those located in the City of New Orleans;

That the books listed on schedule "A", which is attached hereto and made a part hereof, have been adopted by the State Board of Education and are covered by contracts for use in the high schools of the City of New Orleans; and the books listed on schedule "B", which is attached hereto and made a part hereof, have been adopted by the State Board of Education and are covered by contracts for use in the elementary schools in the City of New Orleans; and;

That no text books other than those listed in bulletin No., 126 and schedules "A" and "B" are used as basal texts in the public schools in the State.

(Sgd.) T. H. Harris.

Sworn to and subscribed before me, at Baton Rouge, Louisiana, this 22nd, day of August, 1928. (Sgd.) John B. Smullin, Notary Public.

P.—, D-1. Filed in Evidence 8/24, 1928. (Sgd.) B. F. Burnett, Dy. Clerk.

STATE OF LOUISIANA,
Parish of East Baton Rouge:

Clerk's Office

I hereby certify the foregoing one (1) page to be a true and correct copy of offering marked "D-1", together with documents attached, filed in suit No. 3578 on the docket of the 19th Judicial District Court.

Given under my hand and seal of office, at Baton Rouge, La. this March 14th, 1930.

Celia Stone, Dy. Clerk of Court. Seal of the Clerk of the Parish of East Baton Rouge, La.

State Department of Education of Louisiana, June 15, 1928

Bulletin No. 126

Elementary Textbooks and High School Textbooks for Use in the Public Schools of Louisiana (Orleans Not Included)
T. H. Harris, State Superintendent of Public Education

Public School Officials and Teachers:

This pamphlet contains the titles, with prices, retail and wholesale, of elementary textbooks and high-school text-

books for use in the public schools of Louisiana, Orleans excepted.

The retail prices are the prices charged pupils by the local schoolbook depositories. The prices published in the pamphlet were copied from the contracts bearing the signatures of the publishers. They are, therefore, official, and in no case should higher prices be paid. The State depository is F. F. Hansell & Brother, New Orleans.

The wholesale prices are the prices charged school boards ordering books in wholesale quantities, and these prices involve the understanding that payment is to be made within thirty days after receipt of books. School boards, having on hand unused high-school textbooks at the close of the contract period (September 1st, 1931), have the right to return them to the publishers at the prices paid for them.

The allowance for displaced high-school textbooks is so small as to be negligible, and I am therefore, not publishing the exchange prices.

For basal use, the textbooks here listed must be used to the exclusion of all other texts.

Very truly, T. H. Harris, State Superintendent of Public Education.

High School Textbooks

English

	Retail price	Wholesale price F. O. B. publisher
Comprehensive Standard Dictionary, Funk & Wagnalls Co., New York, N. Y.	$1.00	$ .86
Law's English for Immediate Use, Chas. Scribner's Sons, Atlanta, Ga.	1.35	1.08
Ward's Sentence and Theme, Revised, Scott, Foresman & Co., Atlanta, Ga.	1.14	.99
Miller and Palmer's High-School English, Lyons & Carnahan, Chicago, Ill.	1.23	.984
Literature and Life, Book 1, Scott, Foresman & Co., Atlanta, Ga.	1.55	1.35
Literature and Life, Book 2, Scott, Foresman & Co., Atlanta, Ga.	1.66	1.44

	Retail price	Wholesale price F. O. B. publisher
Literature and Life, Book 3, Scott, Foresman & Co., Atlanta, Ga.	1.73	1.50
Literature and Life, Book 4, Scott, Foresman & Co., Atlanta, Ga.	2.07	1.80
To be purchased by school boards for use of teachers:		
Painter's Introduction to English Literature, Benjamin H. Sanborn & Co., Chicago, Ill.	1.36	1.22
Painter's Introduction to American Literature, Benjamin H. Sanborn & Co., Chicago, Ill	1.36	1.22
Mathematics		
Van Tuyl's Essentials of Business Arithmetic, American Book Company, Cincinnati, Ohio	1.14	.90
Wells and Hart's Modern High-School Algebra, D. C. Heath & Co., Atlanta, Ga.	1.40	1.20
Wentworth-Smith's Plane Geometry, Ginn & Co., Atlanta, Ga.	.94	.75
History		
Elson's Modern Times and the Living Past, American Book Company, Cincinnati, Ohio	2.28	1.80
Stephenson's American History, Ginn & Co., Atlanta, Ga.	1.80	1.44
Civics		
Long's Government and the People, Chas. Scribner's Sons, Atlanta, Ga.	1.50	1.20
Science		
Van Buskirk and Smith's The Science of Everyday Life, Houghton Mifflin Company, Boston, Mass.	1.50	1.20

	Retail price	Wholesale price F. O. B. publisher
George W. Hunter's A Civic Biology, American Book Company, Cincinnati, Ohio	1.60	1.26
Hessler and Smith's Essentials of Chemistry, Benjamin H. Sanborn & Co., Chicago, Ill.	1.25	1.13
Carthart and Chute's Practical Physics, Allyn & Bacon, Atlanta, Ga.	1.51	1.12
Chute's Laboratory Guide to Physics, Allyn & Bacon, Atlanta, Ga.	.56	.45

Latin

D'Ooge's Elements of Latin, Ginn & Co., Atlanta, Ga.	1.24	.99
D'Ooge and Eastman's Caesar in Gaul, Ginn & Co., Atlanta, Ga.	1.62	1.29

French

Listed:		
Fraser and Squair's New Complete French Grammar, D. C. Heath & Co., Atlanta, Ga.	1.52	1.32
or		
Camerlynck's First Year: France: Premiere Annee de Francais, Allyn & Bacon, Atlanta, Ga.	1.18	.93
Camerlynck's France: Deuxieme Annee de Francais, Allyn & Bacon, Atlanta, Ga.	1.18	.93
(The parish boards to make the selection of the course desired to be used).		

Spanish

No books recommended. Teachers to make their own selections.

Commercial Subjects

	Retail price	Wholesale price F. O. B. publisher
Redway's Commercial and Industrial Geography, Chas. Scribner's Sons, Atlanta, Ga.	1.62	1.29
Twentieth Century Bookkeeping and Accounting, Southwestern Publishing Company (Two Year Course), Cincinnati, O.	1.48	1.11
Whigham's Essentials of Commercial Law, Gregg Publishing Company, Chicago, Ill.	.84	.70

Stenography

Teachers to make selections.

Books for Use in Smith-Hughes Agricultural Departments

Goff's' Principles of Plant Culture, The Macmillan Company, Dallas, Texas	1.87	1.68
Lyon's Soils and Fertilizers, The Macmillan Company, Dallas, Texas	1.33	1.20
Plumb's A Study of Farm Animals, Webb Publishing Company, St. Paul, Minn.	1.90	1.60
Davis' Productive Plant Husbandry, J. B. Lippincott Company, Chicago, Ill.	2.00	1.50
Boss' Farm Management, Lyons & Carnahan, Chicago, Ill.	1.31	1.05
Carver's Elements of Rural Economics, Ginn & Co., Atlanta, Georgia	1.39	1.11

Books for Home Economics Departments

McGowan and Waite's Textiles and Clothing, The Macmillan Company, Dallas, Texas	1.10	.99
Willard and Gillett's Dietetics for High Schools, The Macmillan Company, Dallas, Texas	1.16	1.05

	Retail price	Wholesale price F. O. B. publisher
Harris and Lacey's Every Day Foods, Houghton Mifflin Company, Dallas, Texas	1.47	1.17
Matthews' The House and Its Care, Little, Brown & Company, Boston, Massachusetts	1.50	1.12½

Elementary Textbooks Adopted by the State Board of Education for Use During the Session of 1928-1929, with the Privilege of Extending the Contracts for an Additional Five-year Period

Basal List

Textbooks and Publisher

Grade

Reading

New Elson Readers, Scott, Foresman and Company, Chicago, Ill.:

		Retail price	Wholesale price del. to Parish Sch. Bd.
1	Primer	.48	.432
1	Book One	.52	468
2	Book Two	.59	.531
3	Book Three	.66	.594
	The Open Road to Reading, Ginn & Company, Atlanta, Ga.:		
4	Fourth Reader	.56	.504
5	Fifth Reader	.59	.531
6	Sixth Reader	.66	.594
7	Reading and Living, Book I, Charles Scribner's Sons, New York, N. Y.	.83	.747

Arithmetic

Wentworth-Smith School Arithmetic, Ginn & Company, Atlanta, Ga.:

3-4	Book One	.56	.504
5-6	Book Two	.59	.531
7	Book Three	.60	.540

Spelling

		Retail price	Wholesale price del. to Parish Sch. Bd.
1-7	Horn-Ashbaugh Spelling Book, J. B. Lippincott Co., Philadelphia, Pa.	.37	.32

Geography

	McMurry-Parkins Geography, The Macmillan Company, Dallas, Texas:		
4-5	Elementary	1.06	.955
6-7	Advanced	1.39	1.25

History

5	Beginner's History of Our Country, Southern Publishing Company, Dallas, Texas	.60	.54
6	Our Community, The John C. Winston & Company, Philadelphia, Pa.	.65	.58
6	The Story of Louisiana, Bobbs Merrill Company, Indianapolis, Ind.	.95	.76
7	Essential Facts of American History, Benj. H. Sanborn and Co., Chicago, Ill.	1.15	.98

Physiology and Hyg-ene

4	The Primer of Hygiene, World Book Company, Yonkers-on-Hudson, N. Y.	.48	.432
7	The Primer of Sanitation and Physiology, World Book Company, Yonkers-on-Hudson, N. Y.	.84	.756

Writing

1-7	Graves's Muscular Writing, W. S. Benson and Company, Austin, Texas	.08	.071

Language

	Open Door Language, Houghton Mifflin Company, Boston, Mass.:		
3-4	Book One	.53	.48
5-7	Book Two	.75	.63

Drawing

		Retail price	Wholesale price del. to Parish Sch. Bd.
	Practical Drawing, Modern Arts Course, Revised, Practical Drawing Company, Dallas, Texas:		
1-4	Drawing 1-4	.14	.126
5-7	Drawing 5-7	.19	.171

Supplementary List

Silent Reading

	Stone's Silent Reading, Houghton Mifflin Company, Boston, Mass.:		
1	Book One	.56	.51
2	Book Two	.67	.61
3	Book Three	.75	.68
	The Study Readers, Chas. E. Merrill Co., New York, N. Y.:		
4	Fourth Reader	.69	.621
5	Fifth Reader	.71	.639
6	Sixth Reader	.71	.639
	The Silent Reader. The John C. Winston Company, Philadelphia, Pa.:		
7	Seventh Reader	.80	.68

Health, Civics, Safety, and Fire Prevention Readings

1	Safety Hill of Health, World Book Company, Yonkers, New York	.61	.549
2	Building My House of Health, World Book Company, Yonkers-on-Hudson, N. Y.	.65	.585
3	Health Habits, American Book Company, Cincinnati, Ohio	.69	.63
4	Uncle Jim the Fire Chief, Southern Publishing Company, Dallas, Texas	.50	.45
5	Health Habits by Practice, Book One, Lyons and Carnahan, Chicago, Ill.	.82	.72

		Retail price	Wholesale price del. to Parish Sch. Bd.
6	Jimmie and the Junior Safety Council, World Book Company, Yonkers-on-Hudson, New York	.72	.648
7	My Country, Ginn and Company, Atlanta, Georgia	.94	.846
	Informational Reading		
	Child-Story Reader, Lyons and Carnahan, Chicago, Illinois:		
1	First Reader	.49	.43
2	Second Reader	.63	.56
3	Geography for Beginners, Book One, Rand McNally and Company, Chicago, Ill.	.78	.702
	History Stories of Other Lands, Row, Peterson and Company, Chicago, Ill.:		
4	Tales of Long Ago	.63	.57
	Science Readers, D. C. Heath and Company, Atlanta, Ga.:		
5	Book IV	.76	.684
6	Book V	.76	.684
7	Book VI	.76	.684
	Optional List		
	Music		
1-7	The Rural Song Book, Laidlaw Brothers, Chicago, Ill.	.28	.24
1-7	The Community Chorus Book, The John C. Winston Company, Philadelphia, Pa.	.10	.08
	Graded Music		
2-7	Progressive Music Series, Silver, Burdett and Company, Chicago, Ill.:		
2-3	Book One	.61	.549
4-5	Book Two	.65	.585
6-7	Book Three	.68	.612

Dictionary

		Retail price	Wholesale price del. to Parish Sch. Bd.
	Winston Simplified Dictionary, The John C. Winston Company, Philadelphia, Pa.:		
4-5	Primary	.70	.63
6-7	Intermediate	1.20	.95

STATE OF LOUISIANA,
Parish of East Baton Rouge:

Clerk's Office

I hereby certify the foregoing seven (7) pages to be a true and correct copy of Bulletin No. 126 attached to offering "D-1," filed in suit No. 3578 on the docket of the 19th Judicial District Court.

Given under my hand and seal of office, at Baton Rouge, La., this March 14th, 1930.

—— ——, Dy. Clerk of Court. (Seal of the Clerk of the Parish of East Baton Rouge, La.)

List "A"

School Books Adopted by the State Board of Education for Use in the High Schools of the City of New Orleans

Prices are f. o. b. Publisher's Place of Business

Bookkeeping

Twentieth Century Bookkeeping and Accounting Text, Complete No. 1, Southwestern Publishing Co., Cincinnati	$1.11
Twentieth Century Banking Text No. 44, Southwestern Publishing Co., Cincinnati, Ohio	.45
Bookkeeping and Accounting Vol. 2, Series A, by James O. McKinsey, Southwestern Publishing Co., Cincinnati	1.50

Salesmanship

Whitehead's The Business of Selling, American Book Co., Cincinnati, Ohio 1.05

Commercial Law

Peter's Commercial Law, No. 84, Southwestern Publishing Co., Cincinnati, Ohio ..... .75

Civics

Woodburn and Moran's The Citizen and the Republic, Longmans Green Co., New York 1.31

Economics

Thompson's Elementary Economics, B. H. Sanborn & Co., Chicago, Ill. 1.32

English

Ward's Sentence Book, Scott, Foresman & Co., Chicago, Ill. ..... .19
Ward's Sentence and Theme, Scott, Foresman & Co., Chicago, Ill. ..... .99
Claxton and Maginnis' Effective English, Allyn and Bacon, Atlanta, Ga. 1.12
Literature and Life, Book I, Scott, Foresman Co., Chicago 1.35
Pace's American Literature with Readings, Ally & Bacon, Atlanta, Ga. 1.35
Halleck's New English Literature, American Book Co., Cincinnati, Ohio 1.29
Craig's The Speech Arts, Macmillan & Co., Dallas, Texas 1.20
Davis and Lingham's Business English and Correspondence, Ginn & Co. 1.11

History

West's Story of Man's Early Progress, Allyn & Bacon, Atlanta, Ga. 1.50

West's Story of Modern Progress, Allyn & Bacon, Atlanta 1.50
Elson's Modern Times and the Living Past, American Book Co., Cincinnati, Ohio 1.80
Stephenson's American History, Ginn & Co., Atlanta, Ga. 1.44
Cheyney's Short History of England, Ginn & Co., Atlanta, Ga. 1.47
Smith's Industrial History, Macmillan Co., New York 1.05

Latin

Scott's First Latin Lessons, Scott, Foresman & Co., Chicago, Ill. ..... .90
Sanford and Scott's Junior Latin Reader, Scott, Foresman & Co., Chicago, Ill. 1.05
Sanford, Scott and Beeson's Third Latin Book, Scott, Foresman and Co., Chicago, Ill. 1.20
Jones' Prose Composition, Scott, Foresman & Co., Chicago ..... .90
Allen and Greenough's Grammar, Ginn & Co., Atlanta, Ga. 1.20
Knapp's Aeneid, Books I-IX, and XII, Scott, Foresman & Co., Chicago, Ill. 1.35

Mathematics

Hawkes, Luby, Touton's Complete School Algebra, Ginn & Co., Atlanta, Ga. 1.20
Wentworth-Smith's Plane Geometry, Ginn & Co., Atlanta, Ga. ..... .93
Wentworth-Smith's Solid Geometry, Ginn & Co., Atlanta ..... .93
Wentworth-Smith's Plane Trigonometry and Tables, Ginn & Co. 1.20
Schoorling and Reeve's General Mathematics, Ginn & Co., Atlanta, Ga. 1.20
Sutton & Lennes' Business Arithmetic, Allyn & Bacon 1.05

Music

Hollis Dann's Sixth Year Music, American Book Co., Cincinnati ..... .54

Salesmanship

Whitehead's The Business of Selling, American Book Co., Cincinnati, Ohio 1.05

Commercial Law

Peter's Commercial Law, No. 84, Southwestern Publishing Co., Cincinnati, Ohio ..... .75

Civics

Woodburn and Moran's The Citizen and the Republic, Longmans Green Co., New York 1.31

Economics

Thompson's Elementary Economics, B. H. Sanborn & Co., Chicago, Ill. 1.32

English

Ward's Sentence Book, Scott, Foresman & Co., Chicago, Ill. ..... .19

Ward's Sentence and Theme, Scott, Foresman & Co., Chicago, Ill. ..... .99

Claxton and Maginnis' Effective English, Allyn and Bacon, Atlanta, Ga. 1.12

Literature and Life, Book I, Scott, Foresman Co., Chicago 1.35

Pace's American Literature with Readings, Ally & Bacon, Atlanta, Ga. 1.35

Halleck's New English Literature, American Book Co., Cincinnati, Ohio 1.29

Craig's The Speech Arts, Macmillan & Co., Dallas, Texas 1.20

Davis and Lingham's Business English and Correspondence, Ginn & Co. 1.11

History

West's Story of Man's Early Progress, Allyn & Bacon, Atlanta, Ga. 1.50

West's Story of Modern Progress, Allyn & Bacon, Atlanta 1.50
Elson's Modern Times and the Living Past, American Book Co., Cincinnati, Ohio 1.80
Stephenson's American History, Ginn & Co., Atlanta, Ga. 1.44
Cheyney's Short History of England, Ginn & Co., Atlanta, Ga. 1.47
Smith's Industrial History, Macmillan Co., New York 1.05

Latin

Scott's First Latin Lessons, Scott, Foresman & Co., Chicago, Ill. ..... .90
Sanford and Scott's Junior Latin Reader, Scott, Foresman & Co., Chicago, Ill. 1.05
Sanford, Scott and Beeson's Third Latin Book, Scott, Foresman and Co., Chicago, Ill. 1.20
Jones' Prose Composition, Scott, Foresman & Co., Chicago ..... .90
Allen and Greenough's Grammar, Ginn & Co., Atlanta, Ga. 1.20
Knapp's Aeneid, Books I-IX, and XII, Scott, Foresman & Co., Chicago, Ill. 1.35

Mathematics

Hawkes, Luby, Touton's Complete School Algebra, Ginn & Co., Atlanta, Ga. 1.20
Wentworth-Smith's Plane Geometry, Ginn & Co., Atlanta, Ga. ..... .93
Wentworth-Smith's Solid Geometry, Ginn & Co., Atlanta ..... .93
Wentworth-Smith's Plane Trigonometry and Tables, Ginn & Co. 1.20
Schoorling and Reeve's General Mathematics, Ginn & Co., Atlanta, Ga. 1.20
Sutton & Lennes' Business Arithmetic, Allyn & Bacon 1.05

Music

Hollis Dann's Sixth Year Music, American Book Co., Cincinnati ..... .54

Shorthand

The Phonographic Amanuensis, Phonographic Institute, Cincinnati, Ohio 1.25
Rational Typewriting—New High School Edition, Gregg Publishing Co., Chicago, Ill. 1.12
Gregg Manual, Gregg Publishing Co., Chicago, Ill. 1.12
Gregg Speed Studies, Gregg Publishing Co., Chicago, Ill. ..... .90
Gardiner's Constructive Dictation, Gregg Publishing Co., Chicago, Ill. ..... .90

Science

Tower, Smith, Turton and Cope's Physics, P. Blakiston Son & Co., Philadelphia, Penn. 1.08
McPherson and Henderson's Chemistry and Its Uses, Ginn & Co., Atlanta, Ga. 1.20
Salisbury's Physiography, Briefer Course, H. Holt & Co., New York City 1.50
Snyder's General Science, Allyn & Bacon, Atlanta, Ga. 1.20
Smallwood, Reveley and Bailery's New Biology, Allyn & Bacon, Atlanta, Ga. 1.20
Matthew's The House and Its Care, Little, Brown & Co., Boston, Mass. .....
Harris and Lacey's Everyday Foods, Houghton, Mifflin Co., Boston, Mass. .....

French

Roux's A First French Course, Macmillan & Co., Dallas, Texas ..... .99
Fontaine's French Composition, American Book Co., Cincinnati ..... .39
Aldrich, Foster and Roule's Elementary French, Ginn & Co., Atlanta, Ga. 1.17

Spanish

DeVitis' Brief Spanish Grammar, Allyn & Bacon, Atlanta, Ga. 1.05
Wilkins' Beginners' Spanish Reader, H. Holt and Co., New York, N. Y. 1.02

Umphrey's Prose Composition, American Book Co., Cincinnati ..... .60
Seymour and Carnahan's Short Spanish Review Grammar, Heath & Co., Atlanta, Ga. ..... .96
Broomhall's Spanish Composition, Allyn & Bacon, Atlanta, Ga. ..... .90
Warshaw and Bonilla's Elements of Spanish, Scott, Foresman & Co., Chicago, Ill. 1.20
Luria's Correspondencia Commercial, Silver, Burdett & Co., Chicago, Ill. 1.08
Becker's Essentials of Spanish Grammar, Ernest Becker, New Orleans, La. ..... .68
Un Veage a Sud-America by McHale, D. C. Heath & Co., Atlanta ..... .99

Physical Training

Lynch's First Aid, P. Blakiston & Co., Philadelphia, Pa.,
In Cloth Binding ..... .80
In Paper Binding ..... .48

STATE OF LOUISIANA,
Parish of East Baton Rouge:

Clerk's Office

I hereby certify the foregoing three (3) pages to be a true and correct copy of List "A" attached to offering "D-1" filed in suit No. 3578 on docket of the 19th Judicial District Court.

Given under my hand and seal of office, at Baton Rouge, La., this March 14th, 1930.

Celia Stone, Dy. Clerk of Court. (Seal of the Clerk of the Parish of East Baton Rouge, La.)

List "B"

School Books Adopted by the State Board of Education for Use in the Elementary Schools of the City of New Orleans

(Prices are f. o. b. Publisher's Place of Business)

Full name of text	Publisher	Address	Price
Stone's Arithmetic, 3rd Grade	Benj. H. Sanborn Co.	625 S. Wabash Ave., Chicago	$ .42
" " 4th "	" " " "	" " " " "	.42
" " 5th "	" " " "	" " " " "	.45
" " 6th "	" " " "	" " " " "	.45
" " 7th "	" " " "	" " " " "	.48
" " 8th "	" " " "	" " " " "	.48
Thompson's History of the United States	D. C. Heath & Co.	63 N. Pryor St., Atlanta	1.00
American Beginnings in Europe—Gordy	Chas. Scribner's Sons	186 Spring St., Atlanta	.84
The Beginner's History of Our Country—Estill	Southern Publishing Co.	Dallas, Texas	.48
P. J. G. O. & W. English Primary Part I	Ginn & Co.	95 Luckie St., Atlanta	.32
" " " " " " " Part II	" " "	" " " "	.32
" " " " " " Intermediate Part 1	" " "	" " " "	.32
" " " " " " " Part 2	" " "	" " " "	.32
" " " " " " Complete Part 1	" " "	" " " "	.40
" " " " " " " 2	" " "	" " " "	.40
Brigham & McFarlane Essentials of Geography 1st Bk., Pt. 1	American Book Co.	300 Pike St., Cincinnati	.51
" " " " " " " " Pt. 2	" " " "	" " " "	.72
" " " " " " 2nd Bk., Pt. 1	" " " "	" " " "	.84
" " " " " " " " Pt. 2	" " " "	" " " "	.75
Commercial Geography—Brigham	Ginn & Co.	95 Luckie St., Atlanta	1.29
Primer of Physiology—Ritchie	World Book Co.	Yonkers-on-the-Hudson, N. Y.	.70*
" " Sanitation "	" " "	" " " " " "	.70*
" " Hygiene "	" " "	" " " " " "	.64
Health Habits—O'Shea & Kellogg	Macmillan Co.	330 So. Harwood St., Dallas	.60

Natural Method Primer	Chas. Scribner's Sons	186 Spring St., Atlanta	.45
" " First Reader	" " "	" " " "	.48
" " Second Reader	" " "	" " " "	.54
" " Third Reader	" " "	" " " "	.57
The Elson Reader Book 4	Scott Foresman & Co.	63 N. Pryor St., Atlanta	.60
" " " " 5	" " "	" " " " "	.63
" " " " 6	" " "	" " " " "	.63
" " " " 7	" " "	" " " " "	.72
" " " " 8	" " "	" " " " "	.72
New Orleans Spelling List	F. F. Hansell & Bro., Ltd.	414 Carondelet St., New Orleans	.04
Essentials of Woodworking—Griffith	Manual Arts Press	Peoria, Ill.	.93
Listers' Writing Books—Elementary	The Macmillan Co.	330 S. Harwood St., Dallis	.15
Hollis-Dann Music Book 1	American Book Co.	300 Pike St., Cincinnati	.57
" " " " 2	" " "	" " " "	.39
" " " " 3	" " "	" " " "	.39
" " " " 4	" " "	" " " "	.45
" " " " 5	" " "	" " " "	.45
Folk & Art Songs Book 1	C. C. Birchard & Co.	Boston, Mass.	.52
" " " " 2	" " " "	" "	.62[4]
Twice 55 Community Songs No. 1	" " " "	" "	.13[3]
Junior Laurel Song No. 1	" " " "	" "	.80
Winston's Simplified Dictionary—Primary Ed.	J. C. Winston & Co.	Philadelphia, Pa.	.60
Elementary Community Civics—Hughes	Allyn-Bacon	249 Peachtree St., Atlanta	.90
Theory & Practice Cookery	The Macmillan Co.	330 So. Harwood St., Dallas	1.05
Household Arts—Cooley-Spohr	" " "		.99
Chancellors Arithmetic for Evening Schools	American Book Co.	300 Pike St., Cincinnati	.45
Chancellors Standard Short Course for Evening Schools	" " "	" " " "	.60
C. & L. Exercises in Business Practice	Ginn & Co.	95 Luckie St., Atlanta	.42
Little Book of Our Country—Tappan	Houghton-Mifflin Co.	4 Park St., Boston	.28[3]
Gordy Stories of Later American History	Charles Scribner's Sons	186 Spring St., Atlanta	.84
Meek & Wilson English Today Book II	" " "	" " " "	.57
Parsons Land of Fair Play	" " "	" " " "	.84

STATE OF LOUISIANA,
Parish of East Baton Rouge:

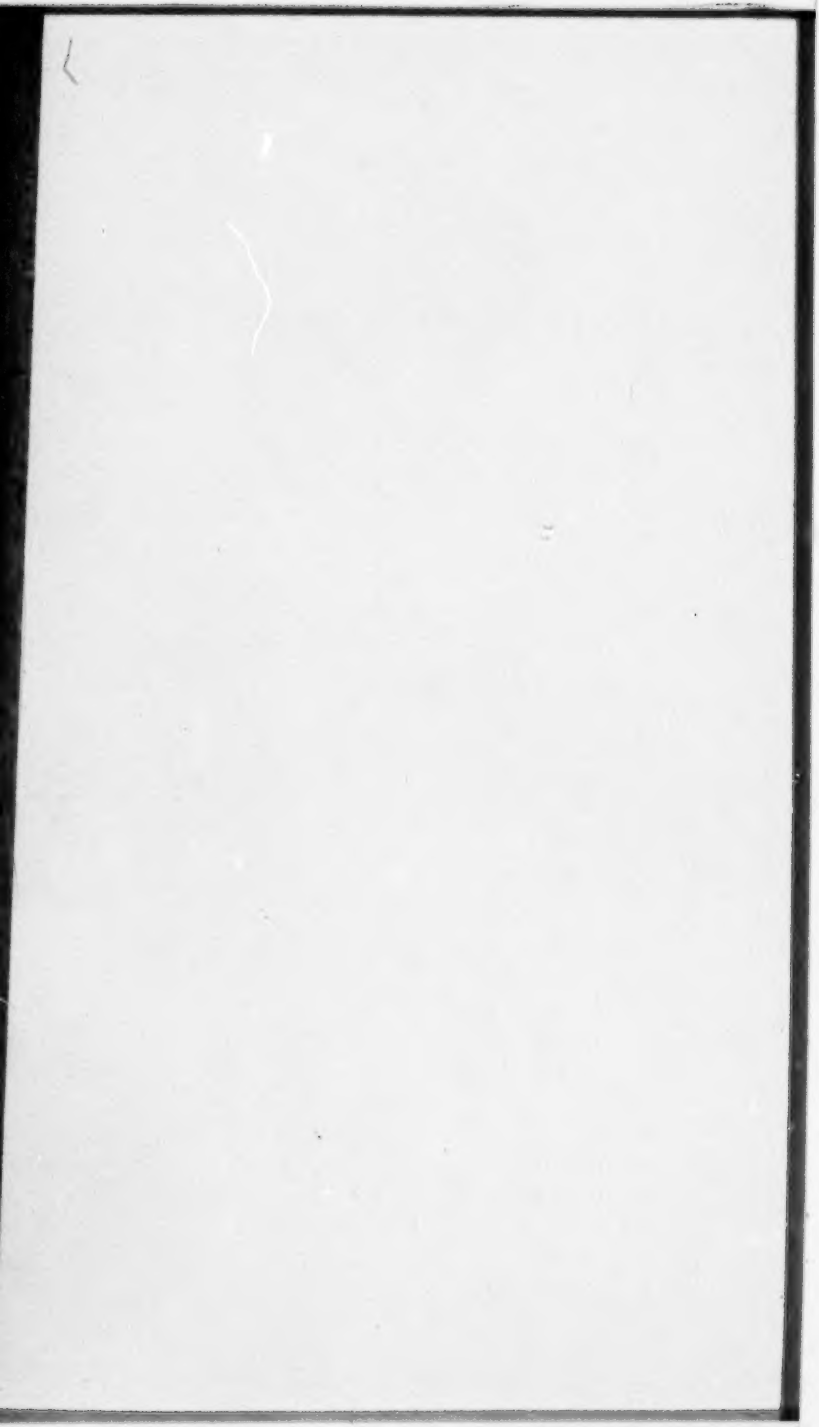
Clerk's Office

I hereby certify the foregoing three pages to be a true and correct copy of "List "B" attached to offering "D-1", filed in suit No. 3578 on docket of the 19th Judicial District Court.

Given under my hand and seal of office, at Baton Rouge, La., this March 14th, 1930.

Celia Stone, Dy. Clerk of Court. (Seal of the Clerk of the Parish of East Baton Rouge, La.)

[File endorsement omitted.]



FILE COPY

FILED
NOV 29
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM

No. 468

EMMETT COCHRAN, ET AL.,
Appellants,

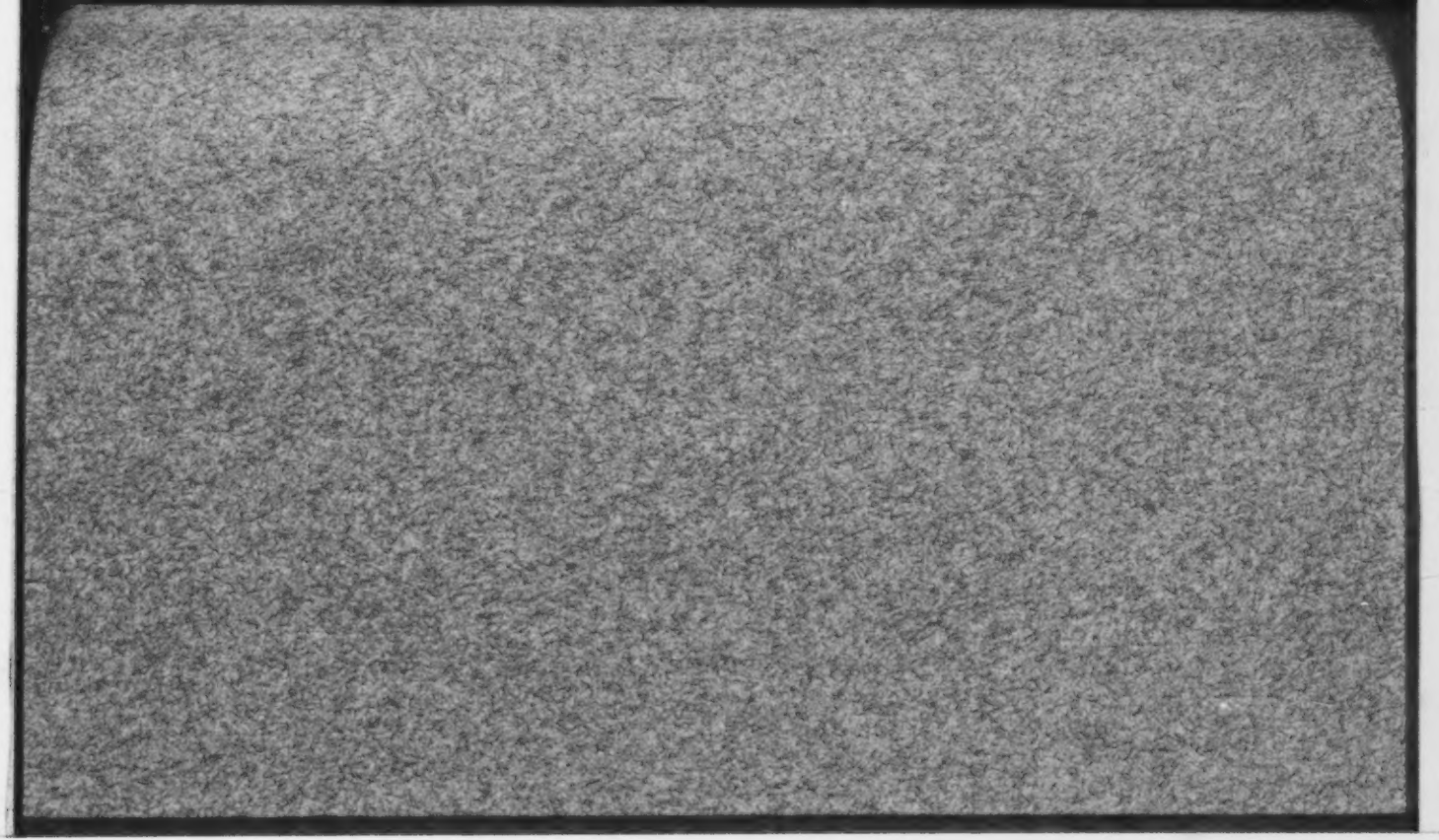
vs.

LOUISIANA STATE BOARD OF EDUCATION, ET AL.,
Appellees.

STATEMENT IN SUPPORT OF JURISDICTION

WADE H. ELLIS,
Counsel for Appellants.

DANIEL C. ROPER,
W. D. JAMIESON,
HERBERT S. WARD,
JAMES U. GALLOWAY,
NASH JOHNSON,
Of Counsel.



SUBJECT INDEX

Acts of Louisiana Legislature here questioned.... 2
Decision of Louisiana Supreme Court upholding Acts 5
Appeal remedy for review..... 5
Power of state to levy a tax measured by purpose for which tax is to be used..... 6
Levying of taxes by state for private purpose raises constitutional question..... 7
Statutes aiding by taxation private schools levy taxes for private purpose..... 7
Furnishing free text books to children attending private schools illegal aid to such schools..... 9
Property taken by taxation, as by right of eminent domain, must be used for public purpose..... 12
Furnishing of school books to children attending private schools obnoxious to federal constitution. 13
Valid state aid to public enterprises differentiated from this case..... 14

Cole v. *LaGrange*, 113 U. S. 1.....6, 9, 12
Connecticut College v. Calvert, 87 Conn. 421....12, 14
Curtis v. *Whipple*, 24 Wis. 350..... 12
Fall Brook Irrigation Dist. v. *Bradley*, 164 U. S. 112 .....7, 9
Great Northern Ry. Co. v. *State of Minnesota*, 49 Sup. Ct. 191, U. S. Sup. Ct. Adv. Ops. March 1, 1929, p. 241..... 2
Green v. *Frazier*, 253 U. S. 233.....9, 14
Jenkins v. *Andover*, 103 Mass. 94..... 12
Parkersburg v. *Brown*, 106 U. S. 487.....6, 9
Savings and Loan Asso. v. *Topeka*, 20 Wall. 655.....7, 12, 13, 14
Smith v. *Donahue*, 195 N. Y. S. 715, 202 App. Div. 656 11
State v. *Switzler*, 143 Mo. 287..... 13
Underwood v. *Wood*, 93 Ky. 177..... 10
Western Turf Ass'n. v. *Greenberg*, 204 U. S. 359.. 5

IN THE

Supreme Court of the United States

OCTOBER TERM

No. 468

EMMETT COCHRAN, ET AL.,
Appellants,

vs.

LOUISIANA STATE BOARD OF EDUCATION, ET AL.,
Appellees.

STATEMENT IN SUPPORT OF JURISDICTION

I.

The jurisdiction of this Court rests on Section 237 of the Judicial Code, as amended by the Act of February 13, 1920.

The appellant relies on the 14th Amendment to the Constitution of the United States as a basis for the jurisdiction of this Court; also, on Section 4, Article 4, thereof.

II.

The date of the decision of the Supreme Court of Louisiana to be reviewed is June 17, 1929 (Typ. R., p. 36 et seq. *All references to Record herein are to typewritten Record*).

Petition for rehearing was denied July 8, 1929 (R., p. 55).

The application for allowance of appeal was presented to the Chief Justice of the Supreme Court of Louisiana on October 2, 1929, and was duly allowed on that date, citation returnable in thirty days. The application and allowance were, therefore, timely, and the final date for filing this appeal in this Court was November 1, 1929, before which date said appeal was perfected.

III.

The decision, above referred to, upheld the Constitutionality of the Acts of the Legislature of the State of Louisiana (hereinafter quoted), which acts had been duly attacked in the pleadings, as being an infringement of Section 4, Article 4, of the Constitution of the United States, and of plaintiff's rights under the due process clause of the 14th Amendment to the Constitution of the United States.

The statutes in question are as follows:

Act No. 143 of the General Assembly of the State of Louisiana; for the year 1928:

"ACT No. 143.

GENERAL APPROPRIATION ACT.

HOUSE BILL No. 51.

AN ACT

MAKING AN APPROPRIATION TO DEFRAY THE ORDINARY EXPENSE OF THE GOVERNMENT; TO PAY THE INTEREST ON THE PUBLIC DEBT; AND TO SUPPORT PUBLIC SCHOOLS AND PUBLIC CHARITIES IN THE STATE OF LOUISIANA; TO BUILD AND REPAIR PUBLIC LEVEES; TO MAINTAIN THE STATE PENITENTIARY; AND OTHER STATE DEPARTMENTS FOR THE YEAR COMMENCING JULY 1, 1928, AND ENDING JUNE 30TH, 1929, AND FOR THE YEAR COMMENCING JULY 1ST, 1929, AND ENDING JUNE 30TH, 1930.

* * * * * *

OUT OF THE SEVERANCE TAX FUND.

For purchase of free school books for the use of School children of this State, to be expended by the State Board of Education of Louisiana as provided by House Bill No. 90 of 1928, or so much thereof as may be necessary..... $750,000.00

(After the above appropriations have been paid or provided for, then the balance from said Severance Tax Fund to be transferred to the current school fund as provided by House Bill No. 90 of 1928").

Act No. 100 of the General Assembly of the State of Louisiana for the year 1928:—

"ACT No. 100.

BOOKS FOR SCHOOL CHILDREN TO BE PAID OUT OF SEVERANCE TAX FUND.

HOUSE BILL No. 90.

AN ACT

PROVIDING FOR THE DISTRIBUTION OF THE SEVERANCE TAX FUND; FIRST, FOR THE PURCHASE OF SCHOOL BOOKS FOR SCHOOL CHILDREN AND THE BALANCE THEREAFTER TO THE PUBLIC SCHOOL FUNDS OF THE STATE OF LOUISIANA.

SECTION 1. Be it enacted by the Legislature of Louisiana, That the Severance Tax Fund of the State, as levied by Act 46 of 1922, as amended, shall be devoted after allowing funds and appropriations as provided by the Constitution of the State, first, to supplying school books to the school children of the State of Louisiana, and that thereafter such further sums as remain in the said Severance Tax Fund shall be transferred to the State public school funds.

SECTION 2. That the State Board of Education of Louisiana, shall provide the said school books for school children free of cost to such children of said tax fund, and thereafter apply the remaining sums out of the said Severance Tax Fund to the State public school funds.

SECTION 3. That this Act shall not apply to persons attending colleges and universities.

APPROVED By Governor:
July 11, 1928."

The Supreme Court of Louisiana interpreted these acts as requiring the expenditure of State funds for the purpose of supplying school books free to children attending both public and private schools (R., p .43).

The plaintiffs below contended that the purchase of text books from public funds, raised by general taxation to be furnished free to all school children, including those attending private schools where tuition is charged (R., p. 3, par. 9) results in irreparable injury to them (R., p. 4, par. 12; R., p. 5, par. 13) and constitutes taking of private property without due process of law (because it constitutes a taking for a private and not a public purpose) in violation of the 14th Amendment to the Constitution of the United States (R., p. 8, par. 16-g) and is contrary to the republican form of Government guaranteed by Section 4 of Article 4 of the Constitution of the United States (R., p. 8, par. 16-g).

In addition, it was urged that these Statutes violated the express provisions of the State Constitution, notably:

Section 12 of Article 4.

> "The funds, credit, property or things of value of the State, or of any political Corporation thereof shall not be loaned, pledged or guaranteed to or for any person or persons, associations, or corporations, public or private."

Section 13 of Article 12.

> "No public funds shall be used for the support of any private or sectarian school",

as well as the several other Articles particularly enumerated in the pleadings.

The Supreme Court of Louisiana held that the expenditure of State funds for the above purpose was an ordinary obligation and expense of government (R., p. 41); was a lawful exercise of the police power of the State (R., p. 43); that the said Acts do not violate the due process clause of the 14th Amendment to the Constitution of the United States, (R. pp. 44 and 45) nor Section 4, Article 4 of the Constitution of the United States (R., p. 45). Thereupon that Court affirmed the decision denying the injunction prayed for.

Thus, there is presented a suit wherein is drawn in question the validity of a Statute of the State of Louisiana on the ground of its being repugnant to the Constitution of the United States in which the decision of the Supreme Court of that State was in favor of the validity of the Statute. (Judicial Code, Section 237).

WHEREFORE, it is submitted that this Court has jurisdiction to review the decision appealed from.

IV.

POINTS AND AUTHORITIES

1.

Appeal is the remedy for review of the decision of a state court of last resort, where a state law is alleged to infringe the Federal Constitution.

Western Turf Ass'n. vs. Greenberg, 204 U. S. 359, 27 Sup. Ct. 384, 51 L. ed. 520, holding that (syllabus)

"The judgment of the highest court of a State

sustaining as a legitimate exertion of the police power of the State, a statute, the validity of which was challenged as repugnant to the Federal Constitution, is reviewable in the Federal Supreme Court by a writ of error."

Great Northern Ry. Co. vs. State of Minnesota, 49 Sup. Ct. 191, 73 L. ed. —, U. S. Sup. Ct. Adv. Opinions March 1, 1929, page 241.

2.

The validity of a statute which can only be fulfilled by resort to taxation depends on the power of the state to levy the tax for the purpose for which the tax fund is to be used.

Parkersburg v. Brown, 106 U. S. 487, 501;

> "Taxation to pay the bonds in question (bonds were issued by City to finance a private enterprise) is not taxation for a public object. It is taxation which takes the private property of one person for the private use of another person."

Cole v. LaGrange, 113 U. S. 1, 6.

> "The general grant of legislative power in the Constitution of a State (Missouri) does not enable the Legislature, in the exercise either of the right of eminent domain or of the right of taxation, to take private property, without the owner's consent for any but a public object. Nor can the Legislature authorize counties, cities or towns to contract, for private objects, debts which must be paid by taxes. * * * These limits of the legislative power are now too firmly established by judicial decisions to require extended argument upon the subject."

3.

The action of a state in levying taxes for a private, as distinguished from a public purpose, raises a constitutional question under the 14th Amendment to the Constitution of the United States.

Fall Brook Irrigation District v. Bradley, 164 U. S. 112, 158:

> "In the Fourteenth Amendment the provision regarding the taking of private property is omitted, and the prohibition against the State is confined to its depriving any person of life, liberty, or property, without due process of law. It is claimed, however, that the citizen is deprived of his property without due process of law, if it be taken by or under state authority for any other than a public use, either under the guise of taxation or by the assumption of the right of eminent domain. In that way the question whether private property has been taken for any other than a public use becomes material in this court, even where the taking is under the authority of the State instead of the Federal government."

4.

That statutes authorizing the aid of private schools by taxation levy taxes for a private, as distinguished from a public purpose, is a principle established and approved by the decisions of this Court.

Savings and Loan Asso. v. Topeka, 20 Wall. 655:

> "We have established, we think, beyond cavil, that there can be no lawful tax which is not laid for a public purpose. It may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not.

"It is undoubtedly the duty of the Legislature which imposes or authorizes municipalities to impose a tax, to see that it is not to be used for puroses of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent. And in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether State or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation.

"But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufactures, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the inn-keeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two thirds of the business men of the city or town. * * * In the case of *Lowell* v. *Boston*, in the Supreme Judicial Court of Massachusetts, the validity of this Act was considered. We have been furnished a copy of the opinion, though it is not yet reported in the regu-

lar series of that court. (111 Mass., 454.) The American Law Review for July, 1873, says that the question was elaborately and ably argued. The court, in an able and exhaustive opinion, decided that the law was unconstitutional, as giving a right to tax for other than a public purpose.

"The same court had previously decided, in the case of *Jenkins* v. *Anderson* (Andover), 103 Mass. 94, that a statute authorizing the town authorities to aid by taxation a school established by the will of a citizen, and governed by trustees selected by the will, was void because the school was not under the control of the town officers, and was not, therefore, a public purpose for which taxes could be levied on the inhabitants.

"The same principle precisely was decided in the case of *Curtis* v. *Whipple*, 24 Wis. 350. In that case a special statute which authorized the town to aid the Jefferson Liberal Institute was declared void because, though a school of learning, it was a private enterprise not under the control of the town authorities. In the subsequent case of *Whiting* v. *Fond du Lac*, already cited, the principle is fully considered and re-affirmed.

"The cases are clearly in point, and *they assert a principle which meets our cordial approval.*" (Italics ours.)

The principles decided in that case have never been denied in this Court, but on the contrary they have frequently been cited with approval. *Parkersburg* v. *Brown*, 106 U. S. 487; *Cole* v. *LaGrange*, 113 U. S. 1; *Fall Brook Irrigation District* v. *Bradley*, 164 U. S. 112; *Green* v. *Frazier*, 253 U. S. 233.

5.

The giving of free text books by the state to school children attending private schools which charge tuition and require the children to furnish their school books,

is essentially, and as a practical matter, an aid to such private institutions by furnishing a part of the equipment of such private schools; if not directly, it is certainly indirectly. If the legislature may not levy a tax for the aid of private schools it may not indirectly do the same thing.

In *Underwood* v. *Wood*, 93 Ky. 177, 15 L. R. A. 825, Judge Pryor said:

> "The Act incorporating the academy in substance provides that Robinson may contract with the parents of children residing within the common school district for teaching their children, and the parent or parents making such contracts, paying doubtless a higher price than the amount of the ordinary school tax, are exempt from the burden of maintaining, furnishing, or repairing any schoolhouse for and during the school years their children may be sent to the Taylor Academy. There are not less than 350 children within the common school district (two of the districts having been consolidated), and out of this number, by the provisions of the Act, Robinson can select such as he may desire to attend his school, by making a contract with their parents; and, having done so, these children attending the academy get their part of the common school fund, to be paid to the teachers of the college, and in this manner diverting the fund from the common school to the payment of teachers in an individual enterprise, and relieving its patrons who live within the district from the burden of taxation imposed for building and keeping in repair the school buildings erected for common school purposes. * * *
>
> "If a case could exist where such legislative action would be sanctioned, it is found in the case before us; but, when ample remedies are afforded by the law regulating common schools to prevent such results as is now attempted to justify this character of legislation, there is no reason for

establishing a precedent that must, if followed, destroy the very existence of common schools. This court has held in several cases that when graded schools have teachers under the control of the common school trustees, and where all children have the benefit of the school within the district, that the fund may be appropriated to the payment of the teachers. In this case the trustees have no voice in the selection of the teachers, nor can any child go to the academy as a pupil without paying tuition, *and in fact the legislative Act has applied the school fund to be used by a private institution.*" (Italics ours.)

Smith v. *Donahue,* 195 N. Y. S. 715, 202 App. Div. 656, 661.

(Action brought to restrain defendants, Board of Education, from procuring with public funds and delivering free text-books and ordinary school supplies for the use of pupils of schools other than the public schools of the district):

"These books have been procured by the board of education and delivered to the school; but the defendants say that books and supplies while so procured and furnished, are furnished under the above section of the Education Law (Sec. 864, subd. 4) to the children attending the schools and not to the schools. Even though we accept the statute as meaning that the books and supplies are to be furnished to the pupils and not the schools, we think the act plainly comes within the prohibition of the Constitution; if not directly in aid of the parochial schools, it is certainly in indirect aid. The scholars do not use text-books and ordinary school supplies apart from their studies in the school. They want them for the sole purpose of their work there. There is no question but that the text-books and ordinary supplies are furnished direct to the public schools; there is no thought that they are furnished to the scholars as

distinct from the schools; neither can there be such a thought in the case of the parochial schools."

6.

In the case of taxation, the test to be applied, as respects the purpose or use, is the same as that applied when property is sought to be taken by right of eminent domain. Applying this test, it is uniformly held that property may not be taken by eminent domain for a use in which the public has not a common and equal right to the use and benefit and that private schools, not under public control, come within this category.

In *Cole* v. *LaGrange*, 113 U. S. 1, 8, it is said:

> "But, so far as respects the use, the taking of private property by taxation is subject to the same limit as the taking by the right of eminent domain. It is a taking by the State for a public use, and not to promote private ends."

The leading case on the subject is *Connecticut College* v. *Calvert*, 87 Conn. 421, 48 L. R. A. (N. S.) 485, which rests on *Jenkins* v. *Andover*, 103 Mass. 94, and *Curtis* v. *Whipple*, 24 Wis. 350—the two cases expressly approved by this Court in *Loan Asso.* v. *Topeka, supra.* In *Conn. College* v. *Calvert*, it is said:

> "Neither the industry of counsel nor our own research has discovered any case (subject to the exception already noted) in which the courts have sustained as constitutional a grant of the right of eminent domain in favor of a private corporation administering a purpose governmental in its nature, whether educational, charitable, or otherwise, except when there was secured to the public a common and equal right to the use or benefit of the property taken. * * *

"It is a matter of common knowledge that there are many colleges for the higher education in which the public have not, and cannot acquire, the right to be educated.

"We find no authority in the decided cases for the position that colleges stand in any different relation to the state from other public charities, and we are unable to see why any distinction can be drawn which would justify the delegation of the power of eminent domain to colleges, while denying it to private hospitals, orphan asylums, or cemeteries."

If the furnishing of school books to children attending private schools is not to be considered an aid to such private schools but an aid only to the children attending such schools, then the tax levied for such purose is equally obnoxious to the federal constitution because it constitutes a diversion of public property to private individuals without distinction as to need for charity and without any special obligation of the state, charitable or otherwise, to such persons.

Savings and Loan Asso. v. Topeka, 20 Wall. 655:

"To lay, with one hand, the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation."

The same principle has been held in state cases, and applied to aid to those attending private schools.

State v. Switzler, 143 Mo. 287, 45 S. W. 245, 40 L. R. A. 280:

"The same authority is found in the Constitu-

tion to levy taxes to clothe and feed the children who may desire to attend the free public schools, as there is to raise money by taxation to hand over to young men and young women to support them while they acquire what is termed 'the higher or university education;' but we find no warrant for either in the organic law of this state or in the character of our government. * * *

"The act under consideration endows the scholar, not the university. * * * It is a pure and simple gift of public money by the state to private individuals, for their own private use. * * *

"It is only necessary to add that counsel for the curators do not attempt to maintain this tax on the theory that the young men and women who would obtain these scholarships are paupers, in the meaning of the law. Even without this admission, it is perfectly apparent that the act, by its terms, does not confine this pension to the children of poor persons who may, in a legal sense, be denominated 'paupers.'"

8.

The distinction between this case and those affirming the constitutional authority of the state to aid railroads or to engage in private enterprises serving the public (Green v. Frazier, 253 U. S. 233), *is that in the latter cases there is secured to the public both public control and common and equal right of use. Loan Asso. v. Topeka,* 20 Wall. 487; *Green v. Frazier, supra; Connecticut College v. Calvert,* 87 Conn. 421.

In the case of private schools, whether sectarian or not and whether run for profit or not, there is lacking this element of public control and common and equal right of the public to use. As regards the constitutional question, therefore, private schools stand on precisely the same footing as a privately owned manu-

facturing industry or any other private enterprise, and they have been so considered by this court in the cases cited.

Respectfully submitted,

WADE H. ELLIS,
Counsel for Appellants.

DANIEL C. ROPER,
W. D. JAMIESON,
HERBERT S. WARD,
JAMES U. GALLOWAY,
NASH JOHNSON,
Of Counsel.

FILE COPY

MAR 24 19
CHARLES ELMORE CR

IN THE

Supreme Court of the United States

OCTOBER TERM

No. 468

EMMETT COCHRAN, ET AL., *Appellants*,
vs.
LOUISIANA STATE BOARD OF EDUCATION, ET AL.,
Appellees.

BRIEF FOR APPELLANTS.

WADE H. ELLIS,
DANIEL C. ROPER,
W. D. JAMIESON,
HERBERT S. WARD,
JAMES U. GALLOWAY,
NASH JOHNSON,
CHALLEN B. ELLIS,
Counsel for Appellants.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

SUBJECT INDEX.

	Page
Opinion of the Courts Below and Jurisdiction....	1
Statement of the Case	2
Specification of Errors	4
Statutes In Question	4
Argument	6
(a) The Question whether taking is for a public use is to be determined by this Court.....	6
(b) Taxes levied by a state must be for a public purpose	8
(c) Test to be applied is whether the public has a common and equal right to the use and benefit	10
(d) Private schools do not come under the category of public use	12
(e) Furnishing free text books is an aid to private schools	20
Conclusion	26

OPINIONS BELOW.

Emmett Cochran, et al., v. Louisiana State Board of Education, 168 Louisiana Reports 1030	1
Silas P. Borden, et al., v. Louisiana State Board of Education, 168 Louisiana Reports 1005	1

STATUTES.

Act No. 100 of the General Assembly of the State of Louisiana for the year 1928	4, 5
Act No. 143 of the General Assembly of the State of Louisiana for the year 1928	5

TABLE OF CASES.

Page

Atchison, T. & S. F. Co. v. Atchison, 47 Kan. 712 17
Beach v. Bradstreet, 85 Conn. 344 .....9, 25, 26
Chicago, M. & P. R. Co. v. Minnesota, 134 U. S. 418 7
Cole v. LaGrange, 113 U. S. 1 .....7, 9, 10
Connecticut College v. Calvert, 87 Conn. 421 ....11, 26
Curtis v. Whipple, 24 Wis. 350.....11, 12, 14, 26
Dakota Synod v. State, 2 S. D. 366 23
Dodge v. Mission Tp., 107 Fed. 827..... 9
Fall Brook Irrigation District v. Bradley, 164 U. S. 112 7
Great Northern Ry. Co. v. State of Minn., 278 U. S. 503 6
Green v. Frazier, 253 U. S. 233 .....7, 25, 26
Jenkins v. Andover, 103 Mass. 94 .....11, 12, 16, 26
Lawton v. Steele, 152 U. S. 133 7
Lowell v. Boston, 111 Mass. 454 18
Meyer v. Nebraska, 262 U. S. 390 ..... 7, 19
Mo. Pac. R. R. Co. v. Nebraska, 164 U. S. 403 ....7, 10
Olcott v. Supervisors of Fond du Lac, 16 Wall. 678 7
Op. of Justices, 211 Mass. 624 12
Op. of Justices, 214 Mass. 599 17
Parkersburg v. Brown, 106 U. S. 487 .....7, 8, 10
Savings & Loan Asso. v. Topeka, 20 Wall. 655....7, 10, 11, 12, 13, 14, 24, 26, 27, 28
Smith v. Donahue, 195 N. Y. S. 715, 202 App. Div. 656 22
State v. Switzler, 143 Mo. 287 24
St. Louis S. W. R. Co., v. Ark., 235 U. S. 348.... 8
Truax v. Corrigan, 257 U. S. 312 .....7, 8
Underwood v. Wood, 93 Ky. 177 21
Western Turf Ass'n. v. Greenberg, 204 U. S. 359 6
Wilkinson v. Leland, et al., 2 Pet. 627 20
Williams v. Stanton Graded Common School Dist., 173 Ky. 708 23

IN THE

Supreme Court of the United States

OCTOBER TERM

No. 468

EMMETT COCHRAN, ET AL., *Appellants*,

VS.

LOUISIANA STATE BOARD OF EDUCATION, ET AL.,
Appellees.

BRIEF FOR APPELLANTS.

Opinion of the Courts Below and Jurisdiction.

The District Court of East Baton Rouge Parish in the State of Louisiana rendered an opinion which is found in the record at pages 17 to 20. The opinion of the Supreme Court of Louisiana (R. 30-31) is found in 168 Louisiana Reports 1030. The issues presented in this case were the same as those presented in *Silas P. Borden, et al. v. Louisiana State Board of Education, et al.*, decided by the Supreme Court of Louisiana on the same day (R. 30). This decision is found in 168

Louisiana Reports 1005. Motion for rehearing in the present case was denied July 8, 1929 (R. 46-48), 168 Louisiana Reports 1030. Paragraph 1 of Rule 12 has been complied with by filing Statement in Support of Jurisdiction in due time.

Statement of the Case.

The state of Louisiana by Acts 100 and 143 of the General Assembly for the year 1928 (hereinafter quoted), authorized and appropriated the sum of $750,000.00, or so much thereof as might be necessary, to be paid from the public tax fund of the state to the State Board of Education for the purchase of school-books to be supplied free to all the school children of the state, (excepting those attending colleges and universities) including children attending private schools, where tuition is charged, and sectarian schools. The plaintiffs below, as citizens of the state of Louisiana, taxpayers thereof, and patrons of the public schools of the state, brought an action in the state District Court of East Baton Rouge Parish (R. 1-9), praying for an order restraining the State Auditor of Public Accounts, the Treasurer of the State of Louisiana, and the Louisiana State Board of Education from using or distributing any of the public monies as authorized and appropriated in the Acts above mentioned for the purchase of school-books to be supplied free to all the school children of the state, on the ground that such Acts were in violation of the State Constitution and of Section 4 of Article IV of the Constitution of the United States and the 14th Amendment thereto (R. p. 6, pp. 15-a; R. p. 7, pp. 16-g) as a taking of private property without due process of law and contrary to guaranteed republican form of

government. The Respondents in their answer admit that the textbooks are to be furnished to all school children and seek to justify the furnishing of such books to private as well as public school children (R. p. 16). The order was denied by the District Court (17-20) on the ground that the plaintiffs, as taxpayers and as patrons of the public schools, were without right to sue (R. 20). Thereupon the plaintiffs applied to the Supreme Court of Louisiana for writs of mandamus, prohibition, and certiorari (R. 20), invoking the supervisory jurisdiction of that court to obtain an order restraining the defendants from proceeding under the Acts, renewing their objections to the validity of the Acts under the State Constitution and under Section 4 of Article IV of the Federal Constitution and the 14th Amendment thereto (R. p. 25, pp. 14-a; p. 27, pp. 14-g). The Supreme Court of Louisiana upheld the right of the defendants as taxpayers to maintain the action, interpreted the Acts as allowing and requiring the expenditure of the public monies for the purpose of supplying school-books free to children attending both public and private schools, (R. 38) and held (three judges dissenting) that the Acts were valid both under the State Constitution (R. 39-40) and the Federal Constitution (R. 40) as a valid exercise of the police power (R. 39); that the taxes were levied for a public purpose (R. 40), and that the levying of taxes under these Acts was for an ordinary obligation and expense of government (R. 37). The Supreme Court denied a motion for rehearing (R. 48) and the case is here on appeal from the decision below and denial of the motion for rehearing.

Specification of Errors.

1. The court below erred in holding that the purchasing and supplying of free school books by the state out of public tax funds, for the use of all the school children of the state, including children attending private, religious, sectarian and other schools not embraced in the public educational system of the state is "an ordinary obligation and expense of government."

2. The court below erred in holding that the purchasing and subsequent granting or lending, of free school books by the state out of public tax moneys, for the use of all the school children of the state, including children attending private, religious, sectarian and other schools not embraced in the public educational system of the state, is permissible as exercise of the police power of the state; that it is for a public purpose so as to authorize the expenditure therefor of state funds; that it does not constitute a taking of the property of plaintiffs, as taxpayers and as patrons of the public schools of the state, without due process of law, in violation of the 14th Amendment to the Constitution of the United States; that it is not in violation of Section 4 of Article IV of the Constitution of the United States which guarantees to every state a Republican Form of Government.

Statutes in Question.

"Act No. 100

Books for School Children to be Paid Out of Severance Tax Fund.

"House Bill No. 90.

"An Act

Providing for the Distribution of the Severance Tax Fund; First, for the Purchase of School Books for School Children and the Balance Thereafter to the Public School Funds of the State of Louisiana.

"Section 1. Be it enacted by the Legislature of Louisiana, That the Severance Tax Fund of the State, as levied by Act 140 of 1922, as amended, shall be devoted after allowing funds and appropriations as provided

by the Constitution of the State, first, to supplying school books to the school children of the State of Louisiana, and that thereafter such further sums as remain in the said Severance Tax Fund shall be transferred to the State public School funds.

"Section 2. That the State Board of Education of Louisiana, shall provide the said school books for school children free of cost to such children out of said tax fund, and thereafter apply the remaining sums out of the said Severance Tax Fund to the State public school funds.

"Section 3. That this Act shall not apply to persons attending colleges and universities." *Act No. 100 of the General Assembly of the State of Louisiana for the year 1928.*

"Act No. 143.
"General Appropriation Act.

"House Bill No. 51.
"An Act

Making an Appropriation to Defray the ordinary expense of the government; to pay the interest on the public debt; and to support public schools and public charities in the state of Louisiana; to build and repair public levies; to maintain the state penitentiary; and other state departments for the year commencing July 1, 1928, and ending June 30th, 1929, and for the year commencing July 1st, 1929, and ending June 30th, 1930.

* * * * * * * * *

"Out of the Severance Tax Fund.

"For purchase of free school books for the use of School children of this State, to be expended by the State Board of Education of Louisiana as provided by House Bill No. 90 of 192[illegible] or so much thereof as may be necessary .....$750,000.00.

"(After the above appropriations have been paid or provided for, then the balance from said Severance Tax Fund to be transferred to the current school fund as provided by House Bill No. 90 of 1928.)" *Act No. 143 of the General Assembly of the State of Louisiana for the year 1928.*

Questions Presented.

No question is presented here as to the right of the state of Louisiana, by means of taxation, to provide text-books free to all the school children attending the public schools of that state. The question presented here is whether, under the Federal Constitution, the state, under the guise of taxation, has the right, as interpreted by the highest court of the state, to take private property to aid private, religious, sectarian, and other schools not embraced in the public educational system of the State of Louisiana, by furnishing text-books free to the children attending such private schools.

ARGUMENT.

The Question whether a Taking of Private Property is for a Public Use is to be determined by this Court.

Appeal is the proper remedy for review of the decision of a state court of last resort, where a state law is alleged to infringe the Federal Constitution and its validity thereunder has been sustained by the state court. *Western Turf Asso. v. Greenberg,* 204 U. S. 359; *Great Northern Railway Co. v. State of Minnesota,* 278 U. S. 503.

The right of the plaintiffs as proper parties to maintain the action was sustained by the court below (R. 35). As this is a decision of a state court of last resort upon a question relating exclusively to rights under state law, and as a question of procedure, it is binding upon this Court.

The construction given the statutes by the highest state court, that they apply to both public and private schools, is binding upon this Court for the purpose of

determining whether the statutes conform to the Constitution of the United States. *Chicago, M. & P. R. Co. v. Minnesota,* 134 U. S. 418; *Missouri Pacific R. Co. v. Nebraska, ex rel. Board of Transportation,* 164 U. S. 403.

In the determination of whether property has been taken by a state by such means as would amount to a deprivation of rights asserted under the Federal Constitution and the highest court of the state has decided that those rights have not been denied, the Supreme Court of the United States may proceed to determine for itself whether those rights have been denied. *Truax v. Corrigan,* 257 U. S. 312.

The assertion, therefore, by the state court, that the taking of private property by means of taxation for the purpose of transferring it by a state law to the aid of private institutions, is a lawful exercise of the taxing power, or of the police power or of any other power of the state, as a taking of private property for public use, where such taking is challenged as violative of rights guaranteed by the Federal Constitution, is not conclusive upon this Court and it may determine for itself whether the taking is in conformity with the Federal Constitution—as a taking for a public use. *Truax v. Corrigan, supra; Fall Brook Irrigation Dist. v. Bradley,* 164 U. S. 112; *Savings and Loan Asso. v. Topeka,* 20 Wall. 655; *Green v. Frazier,* 253 U. S. 235; *Cole v. LaGrange,* 113 U. S. 1; *Parkersburg v. Brown,* 106 U. S. 487; *Meyer v. Nebraska,* 262 U. S. 390; *Lawton v. Steele,* 152 U. S. 133. As was said in *Olcott v. Supervisors of Fond Du Lac,* 16 Wall. 678:

> "The nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power are matters which, like

> questions of commercial law, no state court can conclusively determine for us."

And indeed, as the Court said in *Truax v. Corrigan, supra*:

> "If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here."

Neither the declaration in the statutes themselves nor the decision of the highest court of the state thereupon, that such taking is for a public use or is by due process of law, is conclusive upon this Court. Whether the proposed use is in fact public, is always a judicial question, to be determined by the courts.

> "When the question is whether a tax imposed by a state deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the state court. We must regard the substance rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the state." *St. Louis S. W. R. Co. v. Arkansas,* 235 U. S. 348.

TAXES LEVIED BY A STATE MUST BE FOR A PUBLIC PURPOSE.

The power of the state to tax, or to authorize taxation, under the Federal Constitution, is limited by the uses to which the proceeds may be devoted and one of the fundamental limitations is that the use must be a public one.

Parkersburg v. Brown, 106 U. S. 487, 501:

> "Taxation to pay the bonds in question (bonds were issued by City to finance a private enterprise)

is not taxation for a public object. It is taxation which takes the private property of one person for the private use of another person."

Cole v. LaGrange, 113 U. S. 1, 6:

"The general grant of legislative power in the Constitution of a State (Missouri) does not enable the Legislature, in the exercise either of the right of eminent domain or of the right of taxation to take private property, without the owner's consent for any but a public object. Nor can the Legislature authorize counties, cities or towns to contract, for private objects, debts which must be paid by taxes. * * * These limits of the legislative power are now too firmly established by judicial decisions to require extended argument upon the subject."

Dodge v. Mission Tp., 107 Fed. 827:

"A legislative act which takes, or undertakes to authorize the taking, of private property for a private object, either by taxation or by the exercise of the power of eminent domain, or by any other name, is not a law, but an abitrary decree, whereby the property of one citizen may be transferred to another. Such an act is beyond the limits of the powers granted by the people to the legislatures of the states, and is without legal force or effect. The legislative power of taxation and power of eminent domain are alike limited to the exercise thereof for public objects, and they cannot be successfully prostituted for private purposes. For the same reason the power of a legislature to create or to authorize the creation of a public debt, and the issue of public bonds to be paid by taxation, is subject to the same limitation."

As said in *Beach v. Bradstreet,* 85 Conn. 344, citing the above cases:

"Every definition of 'taxation' expressly or impliedly asserts that it is to be imposed only for public purposes. This is a foundation principle of all constitutional government." (Citing *Savings & Loan Asso. v. Topeka, supra; Parkersburg v. Brown*, 106 U. S. 487.)

THE TEST TO BE APPLIED IS WHETHER THE PUBLIC HAS A COMMON AND EQUAL RIGHT TO THE USE AND BENEFIT.

In the case of taxation, the test to be applied, as respects the purpose or use, is the same as that applied when property is sought to be taken by right of eminent domain. Applying this test, it is uniformly held that property may not be taken by eminent domain for an object in which the *public has not a common and equal right to the use and benefit* and that private schools not under public control, come within this category.

In *Cole v. LaGrange*, 113 U. S. 1, 8, it is said:

"But, so far as respects the use, the taking of private property by taxation is subject to the same limit as the taking by the right of eminent domain. Each is a taking by the State for the public use, and not to promote private ends."

Missouri P. R. Co. v. Nebraska, 164 U. S. 403:

"To require the railroad company to grant to the petitioners a location on its right of way, for the erection of an elevator for the specified purpose of storing from time to time the grain of the petitioners and of neighboring farmers, is to compel the railroad company, against its will, to transfer an estate in part of the land which it owns and holds, under its charter, as its private property and for a public use, to an association of private individuals for the purpose of erecting and maintaining a building thereon for storing grain for

their own benefit, without reserving any control of the use of such land, or of the building, to be erected thereon, to the railroad company for the accommodation of its own business, or for the convenience of the public."

The leading State case on the subject is *Connecticut College v. Calvert*, 87 Conn. 421, which rests on *Jenkins v. Andover*, 103 Mass. 94, and *Curtis v. Whipple*, 24 Wis. 350—the two cases expressly approved by this Court in *Savings & Loan Asso. v. Topeka*, 20 Wall. 655, as hereinafter pointed out. In *Conn. College v. Calvert*, it is said:

"Neither the industry of counsel nor our own research has discovered any case (subject to the exception already noted) in which the courts have sustained as constitutional a grant of the right of eminent domain in favor of a private corporation administering a purpose governmental in its nature, whether educational, charitable, or otherwise, except when there was secured to the public a common and equal right to the use or benefit of the property taken. * * *

"It is a matter of common knowledge that there are many colleges for the higher education of women in which the public have not, and cannot acquire, the right to be educated.

"We find no authority in the decided cases for the position that colleges stand in any different relation to the state from other public charities, and we are unable to see how any distinction can be drawn which would justify the delegation of the power of eminent domain to colleges, while denying it to private hospitals, orphan asylums, or cemeteries."

Opinion of the Justices, 211 Mass. 624:

> "Although eminent domain differs from taxation in the occasion and manner of its exercise, it rests for its justification upon the same basic principle of public necessity. If this be held to be a public purpose, it would be lawful to authorize the commission to exercise the power of eminent domain. This would mean that the home of one wage earner might be taken by the power of the commonwealth for the purpose of handing it over to another wage earner. Neither the power of taxation nor of eminent domain goes to this extent."

Under these cases, therefore, it is of the essence of the justifiable taking of private property under authority of the sovereign that it must be for a use which is public compensation for the taking; and that due process under the Constitution of the United States, implies the giving of some equivalent in the benefits which are supposed to flow to the one whose property is taken, in common with the public, by reason of the taking—benefits comprehended under the phrase "public use" requiring, nevertheless, a reservation of control by the state over the use to which the property is to be devoted and some common and equal right of use, convenience, benefit, and access to all the public.

PRIVATE SCHOOLS DO NOT COME UNDER THE CATEGORY OF PUBLIC USE.

That statutes authorizing the aid of private schools by taxation, levy taxes for a private, as distinguished from a public purpose, is a principle established and approved by the decisions of this Court. The principal case is *Savings & Loan Asso. v. Topeka,* 20 Wall. 655, which rests upon and expressly approves *Jenkins v. Andover, supra,* and *Curtis v. Whipple, supra.*

In *Savings & Loan Asso. v. Topeka*, 20 Wall. 655; the subject was reviewed at length. This Court said:

> "We have established, we think, beyond cavil, that there can be no lawful tax which is not laid for a public purpose. It may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not.
>
> "It is undoubtedly the duty of the Legislature which imposes or authorizes municipalities to impose a tax, to see that it is not to be used for purposes of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent. And in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether State or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation.
>
> "But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the inn-keeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in

favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town. * * * In the case of *Lowell v. Boston,* in the Supreme Judicial Court of Massachusetts, the validity of this Act was considered. We have been furnished a copy of the opinion, though it is not yet reported in the regular series of that court. (111 Mass., 454). The American Law Review for July, 1873, says that the question was elaborately and ably argued. The court, in an able and exhaustive opinion, decided that the law was unconstitutional, as giving a right to tax for other than a public purpose.

"The same court had previously decided, in the case of *Jenkins v. Anderson* (Andover), 103 Mass., 94, that a statute authorizing the town authorities to aid by taxation a school established by the will of a citizen, and governed by trustees selected by the will, was void because the school was not under the control of the town officers, and was not, therefore, a public purpose for which taxes could be levied on the inhabitants.

"The same principle precisely was decided by State Court of Wisconsin in the case of *Curtis v. Whipple,* 24 Wis. 350. In that case a special statute which authorized the town to aid the Jefferson Liberal Institute was declared void because, though a school of learning, it was a private enterprise not under the control of the town authorities. In the subsequent case of *Whiting v. Fond du Lac,* already cited, the principle is fully considered and re-affirmed.

"These cases are clearly in point, and *they assert a principle which meets our cordial approval.*" (Italics ours.)

In *Curtis v. Whipple* (cited and approved in *Savings & Loan Asso. v. Topeka, supra*), 24 Wis. 350, by an act of the legislature the town of Jefferson was authorized

to raise by tax $5,000, to aid in the erection of buildings for the "Jefferson Liberal Institute," in the town, in case the majority of the votes cast upon the question at a special town meeting should be in favor of the tax. The question was decided in the affirmative and Whipple, as town treasurer, proceeded to collect the tax. Curtis resisted the collection.

The court in holding the tax void said:

> "The counsel for the plaintiff correctly state the effect of the act of incorporation when they say that the 'Jefferson Liberal Institute,' for the benefit of which the taxes in question were attempted to be assessed and collected, is essentially a private educational institution, controlled exclusively by the stockholders, through a board of trustees. The town of Jefferson is not a stockholder, and has no voice in its management. The taxpayers in the town, as such, are not stockholders, and have no privileges in the institute that are not common to all the people of this or any other state. The trustees may exclude any or all of the citizens of the town from the institution. * * * It strikes us, 'at the first blush,' that this is not the levy and collection of money for public purposes, as clearly as if the institute were not an incorporated body, but a mere association of private individuals resolved upon the establishment of a like institution. If it were such an institution, or a grammar or classical school, or a seminary built up and established by individual enterprise, as by persons engaged in the profession of teaching, or by others, and owned and controlled by those contributing toward it, and the emoluments belonging to them, we apprehend that no one would contend that the people of Jefferson might be taxed for the purpose of donating the money to it. The fact that it is an institution incorporated by act of the legislature does not change its character in this respect. * * * It can no more be supported by taxation than if it were unincorporated, or a private school or seminary of

the kind above supposed. Nor will the location of the institution at Jefferson, and the incidental benefits which may thereby arise to the people of the town, sustain the tax. That is not the kind of public benefit and interest which will authorize a resort to the power of taxation."

Jenkins v. Andover, 103 Mass. 94, was a suit to restrain the officers of the town of Andover from proceeding to raise money to aid in rebuilding Punchard Free School, a school founded by charitable bequest which vested the order and superintendence of it in trustees, who, though a majority of them were to be chosen by the inhabitants of the town, yet were limited to be members of certain religious societies.

The court discussed the nature of *public schools,* saying:

"Schools which towns are required to maintain, or authorized to maintain, though not required to do so, as a part of our system of common education and which are open and free to all the children and youth of the towns in which they are situated, who are of proper age or qualifications to attend them, or which adjoining towns may unite to support as a part of the same system; * * *

"This class of school does not include private schools which are supported and managed by individuals; nor colleges or academies organized and maintained under special charters for promoting the higher branches of learning, and not specially intended for, nor limited to, the inhabitants of a particular locality. * * *

"But the school is not 'under the order and superintendence of the authorities of the town.' The will requires that it shall be under the direction of eight trustees; three of them to be clergymen of three of the religious societies in the town, and the

other five, though chosen by the inhabitants in town meeting, to be members of those societies. All the other inhabitants of the town are ineligible to the office of trustee; and the authorities of the town, as such, have no control over the school. * * *

"If a school can possibly exist which is not under the control of the town authorities, and yet can be called a common or public school within the meaning of the eighteenth article (state constitution) this is such a school. The fact that it is not under the control of the town authorities is its objectionable feature, and constitutes the reason why moneys raised by taxation or appropriated by the Commonwealth for the support of common schools cannot be applied to its support."

The principles of these cases have been generally adopted by all State courts.

In *Atchison, T. & S. F. R. Co. v. Atchison*, 47 Kan. 712, it was said:

"Of course, the public is interested in education, and taxes may be authorized and properly levied for the maintenance of public institutions of learning; but in this case the subscription and levy were for private and sectarian institutions * * * While it is argued that the public is benefited by the increase of schools and the spread of learning and knowledge, it is not contended that the colleges in question are under the supervision and control of the public, or that there is or could be any legislaaive authority to expend the public revenues for their support."

In *Opinion of Justices*, 214 Mass. 599, it was said:

"All moneys raised by taxation for the purpose of expenditure within the sphere of the public or common schools, as these words have generally

been understood, must be disbursed exclusively for the support of such schools, and cannot be diverted to any other kind of school maintained in whole or in part by any religious sect."

In *Lowell v. Boston*, 111 Mass. 454, 461 (cited and approved in *Loan Asso. v. Topeka, supra*) Justice Wells reviewed the general principles in cogent language, which "can hardly be surpassed for accuracy and clearness" (211 Mass., 624):

> "The power to levy taxes is founded on the right, duty, and responsibility to maintain and administer all the governmental functions of the State, and to provide for the public welfare. To justify any exercise of the power requires that the expenditures which it is intended to meet shall be for some public service, or some object which concerns the public welfare. The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public, or to the state, which results from the promotion of private interests, and the prosperity of private enterprises or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary. It is the essential character of the direct object of the expenditure which must determine its validity, as justifying a tax, and not the magnitude of the interests to be affected, nor the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion.
>
> The principle of this distinction is fundamental."

The principle derived from these cases is that a use which is denominated a "public use," as justifying the taking of private property under either the taxing power or the power of eminent domain, requires a right secured to the public to enjoy the objects for which the tax is levied upon such terms as the public, itself, may lay down, and the control of which the public has reserved even after the aid has passed to the object to which it is granted. If the public, therefore, has not access to that use or participation in, or right of participation in, and some right of control over, that use, for the aid of which the state has taken their property, then such use is not a "public use" and the statute under which the state acts is invalid.

Applying these principles to the case here, it is apparent that the public does not and can not have the right of access to, or participation in, the use—the private schools. A private school may limit its patrons in any manner that it chooses. It may limit them to persons of the Ethiopian race; or to persons of Japanese extraction; or to persons in a certain district; or to persons of a certain degree of birth; or to persons of a certain sect; or to a limited number of persons such as ten or five; and the state cannot restrain such action. The right of control by the state over private schools is greatly restricted (*Meyer v. Nebraska,* 262 U. S. 390); the state has little or no control or supervision over the instruction or instructors in private schools—an essential element in *Jenkins v. Andover, supra.*

Thus, in effect, a taxpayer would be required by such a statute as is here in question to transfer a part of his property to an institution from which he would be or might be debarred from receiving any benefit, or

any right to benefit, or any control over the disposition of such property. This is a plain taking by legislative fiat of the property of A and transferring it to B. And of such action Mr. Justice Story said in *Wilkinson v. Leland, et al.*, 2 Pet. 627, 657:

> "That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. * * * We know of no case in which a legislative act to transfer the property of A to B without his consent has ever been held a constitutional exercise of legislative power in any State in the Union."

It is true that the education of the youth is a matter of public concern; it has been held so from ancient times. But it is equally true from antiquity that the public agencies of education of the youth have been the only institutions which the state has required its citizens to support—institutions to which all the citizens had the common and equal right of attendance. The use was one devoted to the public; one in which all the public had the right of participation. The statement, therefore, that the statutes here are valid because applying to all the school children is unsound, since it is perfectly apparent that the public does not and cannot enjoy the objects for which the tax is levied.

Furnishing free text books is an aid to private schools.

The furnishing of text-books free by the state to school children attending private schools which

charge tuition and require the children to furnish their school books, is essentially, and as a practical matter, an aid to such private institutions by furnishing a part of the equipment of such private schools; if not directly, it is certainly indirectly. If the legislature may not levy a tax for the aid of private schools it may not indirectly do the same thing. In state cases, generally, wherever the question has arisen, it has been recognized that the furnishing of free text-books and the analogous furnishing of tuition of the pupils, constitute aid to the schools.

In *Underwood v. Wood*, 93 Ky. 177, 15 L. R. A. 825, Judge Pryor said:

> "The act incorporating the academy in substance provides that Robinson may contract with the parents of children residing within the common school district for teaching their children, and the parent or parents making such contracts, paying doubtless a higher price than the amount of the ordinary school tax, are exempt from the burden of maintaining, furnishing, or repairing any schoolhouse, for and during the school years their children may be sent to the Taylor Academy. There are not less than 350 children within the common school district (two of the districts having been consolidated), and out of this number, by the provisions of the Act, Robinson can select such as he may desire to attend his school, by making a contract with their parents; and, having done so, these children attending the academy get their part of the common school fund, to be paid to the teachers of the college, and in this manner diverting the fund from the common school to the payment of teachers in an individual enterprise, and relieving its patrons who live within the district from the burden of taxation imposed for building and keeping in re-

pair the school buildings, erected for common school purposes. * * *

"If a case could exist where such legislative action would be sanctioned, it is found in the case before us; but, when ample remedies are afforded by the law regulating common schools to prevent such results as is now attempted to justify this character of legislation, there is no reason for establishing a precedent that must, if followed, destroy the very existence of common schools. This court has held in several cases that when graded schools have teachers under the control of the common school trustees, and where all children have the benefit of the school within the district, that the fund may be appropriated to the payment of the teachers. In this case the trustees have no voice in the selection of the teachers, nor can any child go to the academy as a pupil without paying tuition, *and in fact the legislative Act has applied the school fund to be used by a private institution.*" (Italics ours.)

The contention that such books are furnished to the children attending such schools was dealt with in *Smith v. Donahue,* 195 N. Y. S. 715, 202 App. Div. 656, 661, which was an action brought to restrain defendants, Board of Education, from procuring with public funds and delivering free text-books and ordinary supplies for the use of pupils of schools other than the public schools of the district:

"These books have been procured by the Board of education and delivered to the school; but the defendants say that books and supplies while so procured and furnished, are furnished under the above section of the Education Law (Sec. 864, subd. 4) to the children attending the schools and not to the schools. Even though we accept the

statute as meaning that the books and supplies are to be furnished to the pupils and not the schools, we think the act plainly comes within the prohibition of the Constitution; if not directly in aid of the parochial schools, it is certainly in indirect aid. The scholars do not use text-books and ordinary school supplies apart from their studies in the school. They want them for the sole purpose of their work there. There is no question but that the text-books and ordinary supplies are furnished direct to the public schools; there is no thought that they are furnished to the scholars as distinct from the schools; neither can there be such a thought in the case of the parochial schools."

In *Dakota Synod v. State*, 2 S. D. 366, it was held that the payment by the state of the tuition of a designated class of students in a sectarian university, controlled by a Presbyterian corporation, for instruction in the methods of teaching in the public schools, was an appropriation for the "benefit of" or "aid to" a sectarian school. Upon the same principle was decided the case of *Williams v. Stanton Graded Common School Dist.*, 173 Ky. 708.

If the furnishing of text-books free to children attending private schools is not considered an aid to such private schools, but as incidental to the state educational system, then it logically follows that the tuition of the children attending such schools could be paid; their transportation to and from such schools could be provided; the salaries of the instructors could be paid in part or in whole; and finally, the buildings themselves could be erected with state funds; all which, under the reasoning evinced in the statutes of Louisiana, might be justified on the ground that it is the interest of the state to see that its youth are educated.

If the furnishing of school books to children attending private schools is not to be considered an aid to such private schools but an aid only to the children attending such schools, then the tax levied for such purpose is equally obnoxious to the Federal Constitution because it constitutes a diversion of public property to private individuals without distinction as to need for charity and without any special obligation of the state, charitable or otherwise, to such persons.

In *Savings and Loan Asso. v. Topeka,* 20 Wall. 655, it was said:

> "To lay, with one hand, the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation."

The same principle has been held in state cases, and applied to aid to those attending private schools.

In *State v. Switzler,* 143 Mo. 287, the court said:

> "The same authority is found in the Constitution to levy taxes to clothe and feed the children who may desire to attend the free public schools, as there is to raise money by taxation to hand over to young men and young women to support them while they acquire what is termed 'the higher or university education;' but we find no warrant for either in the organic law of this state or in the character of our government. * * *
>
> "The act under consideration endows the scholar, not the university. * * * It is a pure and simple gift of public money by the state to private individuals, for their own private use. * * *
>
> It is only necessary to add that counsel for the

> curators do not attempt to maintain this tax on the theory that the young men and women who would obtain these scholarships are paupers, in the meaning of the law. Even without this admission, it is perfectly apparent that the act, by its terms, does not confine this pension to the children of poor persons who may, in a legal sense, be denominated 'paupers.' "

As the court said in *Beach v. Bradstreet*, 85 Conn. 344:

> "No public purpose is subserved by taking by taxation the property of the many and giving it, under the guise of state support, to those who are out of reach of its need."

The aid is granted here not only to those who *are* out of reach of its *need* (children attending private schools), but also to those for whom the state has already provided.

If the principle upon which there is allowed a diversion of the public school funds for the benefit of private individuals, is sanctioned, then the division of the public schools funds may be permitted, so that ultimately those whose children attend private schools, under the simulation of bearing the burden of taxation for the public schools, are paying for the maintenance only of their own private schools. This finally means, in effect, the deprivation of the state of its power of taxation (for the support of the public schools) of those who support only their private schools—and practically the destruction of one of the free institutions under our republican form of government.

The distinction between the case here and those affirming the constitutional authority of the state to aid railroads or to engage in private enterprises serving the public (*Green v. Frazier*, 253 U. S. 233) is that in

the latter cases there is secured to the public both public control and common and equal right of use. *Savings & Loan Asso. v. Topeka*, 20 Wall. 655; *Green v. Frazier, supra; Connecticut College v. Calvert*, 87 Conn. 421; *Curtis v. Whipple*, 24 Wis. 350; *Jenkins v. Andover*, 103 Mass. 94.

In the case of private schools, whether sectarian or not and whether run for profit or not, there is lacking this element of public control and common and equal right of the public to use. As regards the constitutional question, therefore, private schools stand on precisely the same footing as a privately owned manufacturing industry or any other private enterprise, and they have been so considered by this Court in the cases cited.

The principle for which we here contend is fundamental and vital in our form of government. As said by the Supreme Court of Connecticut in *Beach v. Bradstreet*, 85 Conn. 344:

> "A republican form of government forbids the raising of taxes for any but public purposes, and under article fourth, section 4, of the Constitution of the United States, Connecticut is forever bound to maintain such form of government, and cannot exercise legislative power inconsistent with it."

Conclusion.

The limits to which states may go in taking private property, though of somewhat wide range, are definitely confined by the Federal Constitution and the cases decided under it, to such a taking only for a *public use*. While a public use, itself, embraces an increasing variety of things, because, doubtless, of

our complex mode of living, yet the principles upon which a public use is determined have been unvaried throughout the cases. The requirements of a public use as deduced from these cases, are: the use must be available to the public and there must be a capability of public use; the public must have or reserve some control over the use; some benefit must flow directly to the public from this use; the "promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object."

It may be difficult, in every case, to draw the line between what is, and what is not, a public use; but a line must be drawn somewhere or the limitations on the taxing power are meaningless and futile. But though hard to draw, there are some things that plainly and beyond doubt fall on one side or the other of the line. Among the uses which clearly fall on the private side, are those in which the public has neither control, as such, nor common and general access to or benefit from. Here is where this Court has drawn the line in *Savings & Loan Asso. v. Topeka, supra,* as plainly and unequivocally marked out. And here is the crux of this case.

Since that interpretation of the Constitution, there have been no changes of condition that make this interpretation inapplicable to the kind of case here presented. Private schools have not changed their nature; public schools have tremendously grown and expanded and any supposed need to commit the education of the youth to private enterprises uncontrolled by the state because of the inability of the state to perform its

functions, has diminished rather than increased. Therefore any thought that the Constitution is broad enough to meet the changing conditions of society has no application here. The principles announced in *Savings & Loan Asso. v. Topeka, supra,* are as sound and applicable, under present day conditions, as they were a hundred years ago.

Without discussing the theories as to how far the state may go in entering businesses heretofore conducted by private enterprises, or how far the state may go in aiding enterprises conducted by private individuals, but over which the state reserves and exercises control, at least to the extent of securing common and equal access and benefit on terms prescribed by the state—theories which are not before the Court in this proceeding—we present here the single question, whether a state having a common school system, controlled by the state, to which all children have access on terms prescribed by the state and to which all taxpayers have equal and common benefit, and supported by taxation upon all the citizens by a levy of general taxes, may divert any of the funds so raised, to the aid, support, or maintenance, in any form, of admittedly private enterprises offering common schooling of the grade offered by the public schools, where the entire control, at least to the extent of selecting those who may receive the benefit and have the access, rests wholly in private hands—in a religious and sectarian organization or in an individual, association or private corporation for profit. To ask the question is to answer it, if taxation, under the Federal Constitution, in all the states, must be confined to a "public use," as

that expression is and always has been understood since the adoption of the Constitution.

Respectfully submitted,

WADE H. ELLIS,
DANIEL C. ROPER,
W. D. JAMIESON,
HERBERT S. WARD,
JAMES U. GALLOWAY,
NASH JOHNSON,
CHALLEN B. ELLIS,
Counsel for Appellants.

FILE COPY

JAN 13
CHARLES ELMORE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

No. 468

EMMETT COCHRAN, ET AL.,
Appellants,

versus

LOUISIANA STATE BOARD OF EDUCATION, ET ALS.,
Appellees.

Motion of Appellees to Dismiss for Want of Jurisdiction.

PERCY SAINT,
Attorney General;

PEYTON R. SANDOZ,
Assistant Attorney General.

H. H. WHITE,
WALTER J. BURKE,
R. F. WHITE,
WHITE, HOLLOMAN & WHITE,
BURKE & SMITH,
Of Counsel.

MONTGOMERY-ANDREE PRINTING CO. INC., 430-432 CHARTRES, N.O.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

No. 468

EMMETT COCHRAN, ET AL.,

Appellants,

versus

LOUISIANA STATE BOARD OF EDUCATION, ET ALS.,

Appellees.

Motion of Appellees to Dismiss for Want of Jurisdiction.

Comes now the appellees in the above entitled cause, by their counsel of record, and move that the appeal herein be dismissed.

PERCY SAINT,
Attorney General;
PEYTON R. SANDOZ,
Assistant Attorney General.

H. H. WHITE,
WALTER J. BURKE,
R. F. WHITE,
WHITE, HOLLOMAN & WHITE,
BURKE & SMITH,
Of Counsel.

FILE COPY

FI
JAN
CHARLES EL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

No. 468

EMMETT COCHRAN, ET AL.,
Appellants,

versus

LOUISIANA STATE BOARD OF EDUCATION, ET ALS.,
Appellees.

Statement in Support of Motion to Dismiss for Want of Jurisdiction.

PERCY SAINT,
Attorney General;

PEYTON R. SANDOZ,
Assistant Attorney General,
Counsel for Appellees.

H. H. WHITE,
WALTER J. BURKE,
R. F. WHITE,
WHITE, HOLLOMAN & WHITE,
BURKE & SMITH,
Of Counsel.

MONTGOMERY-ANDREE PRINTING CO. INC., 430-432 CHARTRES, N.O.

Acts of
Su

Questio
tut

Statute
tax
lev
tio

Free te
is
sec

Use of
be

Educat
of

Judicia
pr
un

Decisio
ru
th
er

Approp
leg
tr
te
as

A citiz
U
st
fo
st

SUBJECT INDEX.

Page

s of Legislature involved, and decisions of Louisiana Supreme Court upholding said Acts 1

stion of conflict of State statute with State Constitution settled by decisions of highest State Court. 3

utes in question valid because State has power to tax for purpose for which tax is levied. Tax levied for public purpose, viz, to promote education of children of the State 4

e textbooks furnished in aid of cause of education is for public purpose, and not in aid of private or sectarian schools or individuals 6

of free textbooks redounds to common and equal benefit of public generally 6

ıcation is one of the purposes for which police power of State may be exercised 8

icial interference with State tax legislation, or appropriations by State legislatures, not justified unless clearly in violation of Federal Constitution. 10

ision of State Court could have beeen made under rules of general jurisprudence broad enough, in themselves, to sustain judgment without consideration of injected federal question 12

ropriation of public money by State legislature is legislative question over which courts have no control, and cannot be enjoined or otherwise contested by a citizen when affected in same manner as mass of citizens 12

itizen must show justiceable right recognized by United States Supreme Court to contest the constitutionality of State law making appropriation for purchase of free school books on ground that statute violates Federal Constitution 13

TABLE OF CASES.

	Page
Act 100 of 1928, Louisiana Legislature (Sec. 1)	6
Act 100 of 1928, Louisiana Legislature (Sec. 2)	7
Act 143 of 1928, Louisiana Legislature	7
Adams v. Russell, 229 U. S. 353; 57 L. ed. 1224	12
Atchison Railroad v. Matthews, 174 U. S. 104	8
Barbier v. Connolly, 113 U. S. 31; 28 L. ed. 923	8, 9
Beach v. Bradstreet, 82 Atl. 1030, 1032; 85 Con. 334; Ann. Cas. 1913 B, 946	5
Borden v. La. Board of Education, 168 La. 1005; 123 So. 655	5
Bossier Parish v. La. Board of Education, 168 La. 1033; 123 So. 655	5
Budd v. New York, 143 U. S. 517	9
Burch v. Earhart, 7 Cal. 59	13
Burt v. Smith, 203 U. S. 129, 51 L. ed. 121	4
Calder v. Bull, 3 Dall. 392	4
Carr v. Indiana, 11 L. R. A. 370	13
Carstairs v. Cochran, 193 U. S. 10, 16; 48 L. ed. 596	3
Cochran v. La. Board of Education, 168 La. 1030; 123 So., p. 664	5
Cole v. LaGrange, 113 U. S. 1, 6	4
Colorado Power Co. v. Halderman, 295 Fed. 178	4
Costillo v. McConnico, 168 U. S. 680	8

TABLE OF CASES—*(Continued)*.

	Page
Cyclopedia of Law and Procedure, Vol. 35, p. 817	9
Cyclopedia of Law and Procedure, Vol. 37, pp. 720, 721	4
Davidson v. Board of Administrators, 96 U. S. 96, 108; 24 L. ed. 619	11
Dent v. West Virginia, 129 U. S. 114	9
Duncan v. Missouri, 152 U. S. 382	8
Enterprise Irrigation District v. Canal Co., 243 U. S. 157	6, 11
Fall Brook Irrigation District v. Bradley, 164 U. S. 112, 158	4, 10
Franklin v. Board, 23 Cal. 173	13
Green v. Frazier, 235 U. S. 233; 64 L. ed., p. 878	10, 11
Gulf Railroad v. Ellis, 165 U. S. 150	9
Halter v. Nebraska, 205 U. S. 34	9
Henderson Bridge Co. v. Henderson, 107 U. S. 614	11
Holden v. Hardy, 169 U. S. 366	9
International Harvester Co. v. Missouri, 234 U. S. 199	9
Johnson v. Risk, 137 U. S. 300, 34 L. ed. 683	12
Jones v. Portland, 245 U. S. 217	9
Katherine C. Roe v. State of Kansas, U. S. S. C. adv. Rp. Jan. 15, 1929, No. 5, p. 166	12
Kelly v. Pittsburgh, 104 U. S. 82	11

TABLE OF CASES—*(Continued)*.

	Page
Knight v. Jackson, 260 U. S. 12	11
Lloyd v. Dollison, 194 U. S. 445	9
Massachusetts v. Mellon, 262 U. S. 447	7, 14
Mulger v. Kansas, 123 U. S. 623	9
Morgan v. Graham, 1 Woods 124	7
Munn v. Illinois, 94 U. S. 113	9
McCaughey v. Lyall, 224 U. S. 558	6, 11
McPherson v. Blacker, 146 U. S. 39	8
New Orleans v. N. O. Waterworks Co., 142 U. S. 88	8
Parkersburg v. Brown, 106 U. S. 487, 501	4
People v. Pacheco, 27 Cal. 175	13
Pierce v. Society of Sisters, 268 U. S. 529; 69 Law. ed. 1070; 39 A. L. R. 468, note at page 477	6
Ruling Case Law, Vol. 26, pp. 48, 49, Sec. 32	4
Savings & Loan Assn. v. Topeka, 20 Wall., 655	4
Slaughter House Cases, 83 U. S. 36, 130; 21 Law ed. 394	8
Smith v. Donahue, 195 N. Y. S. 715	5
Smith v. Meyers, 109 Ind. 1	13
Smyth v. Ames, 169 U. S. 466	9
State v. Donald, 151 N. W. 331, 364; 160 Wis. 21	5
State v. Harworth, 122 Ind. 462; 7 L. R. A. 240	13
Straus v. Foxworth, 231 U. S. 162	8
Underwood v. Wood, 93 Ky. 177	5
Waters-Pierce Oil Co. v. Texas, 212 U. S. 86	6, 11
Wilson v. Jenkins, 72 N. E. 6	13

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

No. 468

EMMETT COCHRAN, ET AL.,

Appellants,

versus

LOUISIANA STATE BOARD OF EDUCATION, ET ALS.,

Appellees.

Statement in Support of Motion to Dismiss for Want of Jurisdiction.

SYLLABUS OF POINTS.

(1)

The question whether or not State Statutes conflict with the Constitution of the State is settled by the decisions of its highest Court.

(2)

The statutes in question are valid because the State has power to tax for the purposes for which the tax is levied.

(3)

The tax in question is not levied for a private but for a public purpose, viz., to promote the education of the

children of the State, without distinction as to race, color, creed, sect or denomination.

(4)

The furnishing of free textbooks is in aid of the cause of education generally—a laudable public purpose, and not in aid of private or sectarian schools or individuals.

(5)

The public has a common and equal benefit flowing from the use of free textbooks, and *quo ad* their use the public authorities of the State have control, whether the books are used by pupils of the public or private schools.

(6)

Education is one of the purposes for which the police power of the State may be exercised.

(7)

Judicial interference with State tax legislation, or with appropriations of public funds by State legislatures, cannot be justified unless it is clear beyond reasonable controversy that rights secured by the Federal Constitution have been violated.

(8)

The decision of the State Court could have been made under rules of general jurisprudence broad enough, in themselves, to sustain the judgment without consideration of the federal question sought to be injected.

(9)

The appellants attack the legality of a specific appropriation made by the Legislature of Louisiana for the purchase of free textbooks for the use of the school children of the State. Whether or not such an appropriation

should be made is a legislative question over which the courts have no supervision or control.

A citizen cannot enjoin or otherwise contest appropriations made by the Legislature when affected in the same manner as the mass of citizens.

(10)

Where a citizen is accorded a right of action by the State Supreme Court to contest the constitutionality of a State law making an appropriation for the purchase of books for free distribution among all educable children of the State, and the law has been declared by the State Supreme Court to be constitutional, on appeal to the United States Supreme Court upon the alleged violation of Section 4 of Article IV of the Federal Constitution, and under the due process clause of the Fourteenth Amendment to the said Constitution, such citizen should show some right recognized as justiceable by the United States Supreme Court before jurisdiction will be entertained.

AUTHORITIES.

(1)

The question whether or not State Statutes conflict with the Constitution of the State is settled by the decisions of its highest Court.

"The question whether or not a state statute conflicts with the Constitution of the State is settled by the decision of its highest Court."

Carstairs v. Cochran (Md. 1904), 24 S. Ct. 318; 193 U. S. 10, 16; 48 L. Ed. 596.

"Whether or not a state court exceeded its functions under the State Constitution cannot give

rise to a question respecting due process of law which will sustain the appellate jurisdiction of the federal Supreme Court."

Burt v. Smith (N. Y. 1906), 203 U. S. 129, 27 S. Ct. 37, 51 Law Ed. 121.

"The Supreme Court of the United States has no jurisdiction to determine that any law of any State legislature, contrary to the Constitution of such State, is void."

Calder v. Bull, 3 Dall. 392.

Colorado Power Co. v. Halderman, 295 Fed. 178.

(2)

The Statutes in question are valid because the State has power to tax for the purposes for which the tax is levied.

"Education is one of the purposes for which public funds raised by taxation may be expended."

26 R. C. L., pp. 48, 49, Sec. 32.

37 Cyc., pp. 720, 721, Sec. 2.

(3)

The tax in question is not levied for a private, but for a public purpose.

Cases cited by appellants distinguished.

Parkersburg v. Brown, 106 U. S. 487, 501.

Cole v. LaGrange, 113 U. S. 1, 6.

Fall Brook Irrigation Dist. v. Bradley, 164 U. S. 112, 158.

Savings & Loan Assn. v. Topeka, 20 Wall. 655.

The above cases cited from State Courts, viz., *Underwood v. Wood, 93 Ky. 177; Smith v. Donahue, 195 N. Y. S. 715*, etc., do not apply because they simply interpret the statutes and the constitutions of the respective states in which they were rendered.

In Louisiana, the highest Court of the State has held, in three cases, that statutes providing for free school books are not invalid as lending or granting state funds derived from taxation to private or sectarian purposes.

Borden v. La. State Board of Education, 168 La. 1005; 123 So. 655.

Cochran v. La. State Board of Education, 168 La. 1030; 123 So. 664.

Bossier Parish v. La. State Board of Education, 168 La. 1033; 123 So. 665.

"A tax levied by the legislature is for a public purpose, so as to render it constitutional, where it is for the support of government, or for any of the recognized objects of government, or if the proceeds will directly promote the welfare of the community in equal measure."

Beach v. Bradstreet, 82 Atl. 1030, 1032; 85 Conn. 334; Ann. Cas. 1913B, 946.

"The purposes for which taxes may be levied are denominated public purposes, not in the broad general sense, but in the constitutional sense of such statewide purposes as are contemplated by the functions of government under the system created by the fundamental law."

State v. Donald, 151 N. W. 331, 364; 160 Wis. 21.

"The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable the United States Supreme Court to revise the decisions of the State courts upon questions of State law."

Enterprise Irrigation Dist. v. Canal Co., 243 U. S. 157.
McCaughey v. Lyall, 224 U. S. 558.
Waters-Pierce Oil Co. v. Texas, 212 U. S. 86.

(4)

The furnishing of free textbooks to the school children of the State accrues to the benefit of all of the children of the State, and is not in aid of private or sectarian schools or individuals.

Pierce v. Society of Sisters, 268 U. S. 529; 69 Law Ed. 1070; 39 A. L. R. 468, note at p. 477.

"Be it enacted by the Legislature of Louisiana, That the Severance Tax Fund of the State, as levied by Act 140 of 1922, as amended, shall be devoted after allowing funds and appropriations as provided by the Constitution of the State, first, to supplying school books to the school children of the State of Louisiana, and that thereafter such further sums as remain in the said Severance Tax Fund shall be transferred to the State public school funds."

Sec. 1, Act 100 of 1928, Legislature of Louisiana.

"For purchase of free school books for the use of school children of this State, to be expended by the State Board of Education of Louisiana as provided by House Bill No. 90 of 1928, or so much thereof as may be necessary.....$750,000.00

(After the above appropriations have been paid or provided for, then the balance from said Severance Tax Fund to be transferred to the current school fund as provided by House Bill No. 90 of 1928)." *(Act 143 of 1928, Legislature of Louisiana, p. 188).*

If the acts had provided free textbooks for other than **all the school children of the State,** for example, only those who attended public schools, they might have been violative of the equality and uniformity clauses of the Constitution of the State and of the United States.

(5)

The public has a common and equal benefit flowing from the use of free textbooks and *quo ad* their use the public authorities of the State have control, whether the books are used by pupils of public or of private schools.

"That the State Board of Education of Louisiana shall provide the said school books for school children, free of cost, to such children out of said tax fund, and thereafter apply the remaining sums out of the said Severance Tax Fund to the State public school funds."

Sec. 2, Act No. 100, of the Legislature of Louisiana of 1928, p. 114.

"To invoke the judicial power to disregard a statute as unconstitutional, the party who assails it must show not only that the statute is invalid, but that he has sustained, or is immediately in danger of sustaining, some direct injury as a result of the enforcement, and not merely that he suffers in some indefinite way in common with people generally."

Massachusetts v. Mellon, 262 U. S. 447.
Morgan v. Graham, 1 Woods, 124.

"A party has no interest to assert that a statute is unconstitutional because it might be construed so as to cause it to violate the Constitution. His right is limited solely to the inquiry whether in the case which he presents the effect of applying the statute is to deprive him of a constitutional right."

Costillo v. McConnico, 168 U. S. 680.

Straus v. Foxworth, 231 U. S. 162.

New Orleans v. N. O. Waterworks Co., 142 U. S. 88.

"The equal protection of the laws is secured if the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of government."

Duncan v. Missouri, 152 U. S. 382.

Atchison Railroad v. Matthews, 174 U. S. 104.

McPherson v. Blacker, 146 U. S. 39.

(6)

Education is one of the purposes for which the police power of the State may be exercised.

"The police power of states extends to the protection of lives, limbs, health, comfort, morals, and quiet of society."

Barbier v. Connolly, 113 U. S. 31; 28 L. Ed. 923.

Slaughter House Cases, 83 U. S. 36, 130; 21 L. Ed. 394.

"The power of the states to establish and maintain systems of common schools, to raise money for that purpose by taxation, and to govern, control, and regulate such schools when established is one of the powers not delegated to the United States

by the Constitution, nor prohibited by it to the states, and is reserved to the states respectively or to the people. * * * ."

35 Cyc., p. 817.

"Under this amendment the Supreme Court cannot supervise State legislation in the exercise of the police power beyond protesting against laws of an ordinary character having no reasonable relation to the execution of lawful purposes."

Jones v. Portland, 245 U. S. 217.

"An objection that a State statute denies to a party the equal protection of the law can only be sustained if the statutes treat the party differently from what it does others who are in the same situation as he; that is, in the same relation to the purposes of the statute."

Lloyd v. Dollison, 194 U. S. 445.
International Harvester Co. v. Missouri, 234 U. S. 199.
Gulf Railroad v. Ellis, 165 U. S. 150.
Halter v. Nebraska, 205 U. S. 34.

"Neither this amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and all of its wealth and prosperity."

Barbier v. Connolly, 113 U. S. 31.
Holden v. Hardy, 169 U. S. 366.
Dent v. West Virginia, 129 U. S. 114.
Mulger v. Kansas, 123 U. S. 623.
Munn v. Illinois, 94 U. S. 113.
Budd v. New York, 143 U. S. 517.
Smyth v. Ames, 169 U. S. 466.

(7)

Judicial interference with State tax legislation cannot be justified unless it is clear beyond reasonable controversy that rights secured by the Federal Constitution have been violated.

"Judicial interference with state tax legislation, the purpose of which has been declared by the people of the State, the legislature, and the highest State court to be of a public nature and within the taxing power of the State, cannot be justified unless it is clear beyond reasonable controversy that rights secured by the Federal Constitution have been violated."

Green v. Frazier, 235 U. S. 233; 64 L. ed. 878.

(For other cases, see Courts I, e, 3, C, in Digest Sup. Ct. 1908).

"Whenever a state law imposes a tax, assessment, servitude or other burden upon property for the public use, either of the whole state or a limited portion thereof, and such law provides a mode of confirming or contesting such a charge in the ordinary courts of justice, with due notice to the owner, the judgment in such proceedings does not deprive the owner of his property without due process of law."

Fallbrook Irrigation Dist. v. Bradley, 164 U. S. Ill, and Syl.

"* * *. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the XIVth Amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under

consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State Court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded. If, therefore, it were possible to define what it is for a State to deprive a person of life, liberty or property without due process of law, in terms which would cover every exercise of power thus forbidden to the State, and exclude those which are not, no more useful construction could be furnished by this or any other court to any part of the fundamental law."

Davidson v. Board of Administrators of New Orleans, 96 U. S. 96-108; 24 L. ed. (1. c.) 619.

"The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable the United States Supreme Court to revise the decisions of the State courts upon questions of State laws."

Enterprise Irrigation Dist. v. Canal Co., 243 U. S. 157;

McCaughey v. Lyall, 224 U. S. 558;

Waters-Pierce Oil Co. v. Texas, 212 U. S. 86.

"However great the hardships or unequal the burden, it can not be said that a tax collected for a public purpose is taking the property of the taxpayer without due process."

Kelly v. Pittsburgh, 104 U. S. 82.

Henderson Bridge Co. v. Henderson, 107 U. S. 614.

Green v. Frazier, 235 U. S. 233.

Knight v. Jackson, 260 U. S. 12.

(8)

The decision of the State Court could have been made under rules of general jurisprudence broad enough, in themselves, to sustain the judgment without consideration of the federal question sought to be injected.

Adams v. Russell, 229 U. S. 353; 57 L. ed. 1224.
Johnson v. Risk, 137 U. S. 300, 34 L. ed. 683.

The analogy sought to be drawn by appellants between the case at bar and cases of eminent domain is favorable to appellees.

> "The construction placed by the Supreme Court of a state upon statutes of the state authorizing the condemnation, under the power of eminent domain, of places of unusual historical interest, and its holding that their meaning is clear as applied to proceedings to acquire title to an Indian mission, are binding on the Supreme Court of the United States."
>
> *Katherine C. Roe v. State of Kansas, etc., U. S. S. C. adv. Rp., January 15, 1929, No. 5, p. 166.*

(9)

The appellants attack the legality of a specific appropriation made by the Legislature of Louisiana for the purchase of free text-books for the use of the school children of the State. Whether or not such an appropriation should be made is a legislative question over which the courts have no supervision or control.

A citizen cannot enjoin or otherwise contest appropriations made by the Legislature when affected in the same manner as the mass of citizens.

> "Whether an appropriation shall or shall not be made is a legislative question, and over purely

legislative questions the courts have no supervision or control. A question of that character is beyond the touch of the judiciary, for one department of government cannot enter the domain of another."

Smith v. Meyers, 109 Ind. 1.
State v. Haworth, 122 Ind. 462, 7 L. R. A. 240.
Wilson v. Jenkins, 72 N. E. 6.
Burch v. Earhart, 7 Cal. 59.
Franklin v. Board, 23 Cal. 173.
People v. Pacheco, 27 Cal. 175.
Carr v. Indiana, 11 L. R. A. 370.

(10)

Where a citizen is accorded a right of action by the State Supreme Court to contest the constitutionality of a State law making an appropriation for the purchase of books for free distribution among all educable children of the State, and the law has been declared by the State Supreme Court to be constitutional, on appeal to the United States Supreme Court upon the alleged violation of Section 4 of Article IV of the Federal Constitution, and under the due process clause of the Fourteenth Amendment to the said Constitution, such citizen should show some right recognized as justiceable by the United States Supreme Court before jurisdiction will be entertained.

A citizen of the United States attacked an appropriation of Congress on the ground that the appropriation would increase the future taxation and thereby take her property without due process of law, the interest of the taxpayer in the funds belonging to the government was held to be so minute

and the effect on the individual taxpayer so remote as not to present any basis for an appeal to courts. *Massachusetts v. Mellon, 262 U. S. 447, 43 S. Ct. 597; 67 L. ed. 1078.*

The conclusion of the Court in that case is stated in the following language:

"If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect to the statute here under review, but also in respect to every other appropriation act and statute whose administration requires the outlay of public money, whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained." *Id.*

We submit that this Court has no jurisdiction under Section 237 of the Judicial Code, as amended, or any other law, and respectfully pray that this cause be dismissed as in case of lack of jurisdiction.

Respectfully submitted,

PERCY SAINT,
Attorney General;
PEYTON R. SANDOZ,
Assistant Attorney General,
Counsel for Appellees.

H. H. WHITE,
WALTER J. BURKE,
R. F. WHITE,
WHITE, HOLLOMAN & WHITE,
BURKE & SMITH,
Of Counsel.

FILE COPY

Office Supreme Court
FILED
APR 5 19
CHARLES ELMORE CR
CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929

No. 468

EMMETT COCHRAN ET AL.,
Appellants,

versus

LOUISIANA STATE BOARD OF EDUCATION ET AL.,
Appellees.

BRIEF ON BEHALF OF APPELLEES.

PERCY SAINT,
Attorney General;
PEYTON R. SANDOZ,
Asst. Attorney General.

H. H. WHITE,
WALTER J. BURKE,
WHITE, HOLLOMAN & WHITE,
BURKE & SMITH,
Of Counsel.

HAUSER PRINTING CO., NEW ORLEANS

SUBJECT INDEX:

	PAGE
STATEMENT OF THE CASE	1
SPECIFICATION OF ERRORS	3
ARGUMENT	5
AUTHORITIES OF APPELLANTS IN SUPPORT OF THEIR CONTENTION THAT PRIVATE SCHOOLS DO NOT COME UNDER CATEGORY OF PUBLIC USE	24
POLICE POWER: EDUCATION IS ONE OF THE PURPOSES FOR WHICH THE POLICE POWER OF THE STATE MAY BE EXERCISED	27
RENEWAL OF MOTION TO DISMISS	30
CONCLUSION	30

TABLE OF CASES:

PAGE

Barbier v. Connolly, 113 U. S. 27, 31 ..... 27, 29

Beach v. Bradstreet, 82 Atl. 1030 ..... 19, 20

Beveridge—Life of Chief Justice Marshall, Vol. 1, p. 162 26

Budd v. New York, 143 U. S. 517 28

Century Digest, Sec. 67, Dec. Dig., Sec. 38 ..... 19, 20

Cochran v. La. Board of Education, 168 La. 1030, 123 So. 664 9

Commonwealth of Massachusetts v. Andrew W. Mellon, 262 U. S. 1078, 67 L. ed. 447 22

Curtis v. Whipple, 24 Wis. 350 25

Dakota Synod v. State, 2 S. D. 366 25

Dent v. West Virginia, 129 U. S. 114 28

Holden v. Hardy, 169 U. S. 366 28

Jenkins v. Andover, 103 Mass. 94 25

Loan Association v. Topeka, 20 Wall. 655, 22 L. ed. 455 26

McKane v. Durston, 153 U. S. 684, 687 18

Marshall, Governor of Indiana, v. Dye, 231 U. S. 250 16

Morgan v. Graham, 1 Woods 125 ..... 21, 22

Mountain Timber Co. v. Washington, 243 U. S. 219, 234, 61 L. ed. 685, 694, 37 Sup. Ct. Rep. 260, Am. Cas. 1917D, 642, 14 N.C.C.A. 927 ..... 17, 18

Mulger v. Kansas, 123 U. S. 623 28

Munn v. Illinois, 94 U. S. 113 28

Ohio ex rel. Davis v. Hildebrant, 241 U. S. 565, 60 L. ed. 1172, 36 Sup. Ct. Rep. 708 18

O'Neill v. Leamer, 239 U. S. 244, 248, 60 L. ed. 249, 263, 36 Sup. Ct. Rep. 54 18

TABLE OF CASES—Continued

PAGE

Pacific States Telephone & Telegraph Co. v. Oregon, 223 U. S. 118 ..... 15, 16, 17, 18

Pierce v. Society of Sisters, 268 U. S. 510 14

Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 427, 38 L. ed. 1031, 1036, 14 Sup. Ct. Rep. 1114 18

Reetz v. Michigan, 188 U. S. 505, 508, 47 L. ed. 563, 566, 23 Sup. Ct. Rep. 390 18

Rogers v. Peck, 199 U. S. 425, 435, 50 L. ed. 256, 260, 26 Sup. Ct. Rep. 87 18

Saunders v. Shaw, 244 U. S. 317, 320, 61 L. ed. 1163, 1166, 37 Sup. Ct. Rep. 638 18

Smith v. Donahue, 195 N.Y.S. 75 ..... 23, 24, 25

Smyth v. Ames, 169 U. S. 466 28

Standard Oil Co. v. Missouri, 224 U. S. 270, 286, 56 L. ed. 760, 769, 32 Sup. Ct. Rep. 406, Ann. Cas. 1913D, 936 18

State of Ohio ex rel. E. H. Bryant v. Akron Metropolitan Park, District for Summit County, Vol. 8, Adv. Opinions U. S. Sup. Ct., 1929 Term, 74 L. ed. —— 17, 18

State v. Switzler, 143 Mo. 287 25

Underwood v. Wood, 93 Ky. 177 25

Williams v. Stanton Graded Common School District, 173 Ky. 708 25

Words and Phrases, Vol. 6, pp. 5815-5817; Vol. 8, p. 7773 20

STATUTES INVOLVED.

	PAGE
Act 109 of 1921 (Title)	10
Act 109 of 1921 (Sec. 4, p. 235)	10
Act 100 of 1922 (Sec. 21, p. 211)	12
Act 100 of 1928, p. 114	13, 14
Act 143 of 1928, pp. 114, 188	13, 14

ARTICLES OF CONSTITUTION CITED.

	PAGE
Sec. 4, Article IV of the Federal Constitution	9
Sec. 12, Article IV of Constitution of 1921	15
Sec. 13, Article XII of Constitution of 1921	14
Sec. 14, Article XII of Constitution of 1921	11
Sec. 18, Article XIX of Constitution of 1921	27

APPENDIX:

	PAGE
Transportation on all street railways and suburban railroads for children attending schools	33
Ferries required to transport school children free of charge	33
Transportation of school children at expense of Parish School Boards	33
Fish Hatcheries	33
Dipping of cattle	34
Vaccination	34
Act 109 of 1921	34
Act 140 of 1922	40
Act 5 of 1928, amending and re-enacting Sections 2 and 5 of Act 140 of 1922	52

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929

No. 468

EMMETT COCHRAN ET AL.,

Appellants,

versus

LOUISIANA STATE BOARD OF EDUCATION ET AL.,

Appellees.

BRIEF ON BEHALF OF APPELLEES.

STATEMENT OF THE CASE.

The statement of appellants is substantially correct except that we believe the language used on page 2 of appellants' brief, is misleading, wherein it is asserted "The State of Louisiana by Acts 100 and 143 of the Legislature of 1928 (hereinafter quoted), authorized and appropriated the sum of $750,000.00, or so much thereof as might be necessary, to be paid from "the public tax fund" of the State to the State Board of Education for the purchase of school books to be supplied free to all

the school children of the State, (excepting those attending colleges and universities) including children attending private schools, where tuition is charged, and to sectarian schools. * * *"

Under paragraph 3 of Rule 25 of this Court, the appellees are not required to set forth a statement of facts, but are reserved the privilege of correcting any inaccuracy or omission in the statement of the other side.

We respectfully direct the attention of this Court to the fact that the fund out of which the textbooks are purchased for the school children of the State is not the General Fund of the State, but is a special fund created by the imposition of severance taxes upon certain natural resources, such as oil wells, timber lands, salt, sulphur, etc. We desire to call the attention of the Court to the fact that these plaintiffs neither in their original petition (R., 1), nor in their petition for appeal (R., 49) assert or allege that they are engaged in any of the businesses upon which a severance tax has been imposed under the laws of Louisiana.

We further point out, as possibly an inadvertent omission from the statement of the case set forth by appellants in their brief, that the Severance Tax Fund of the State of Louisiana has been dedicated to various purposes, one of which is supplying funds with which to obtain school books to be supplied free to all the school children of the State, and after the severance tax funds already appropriated and especially allocated to the purchase of textbooks for all the school children of the State, then, and only then, under the statutes of Louisiana, does the

surplus of such Severance Tax Fund go into the general school fund of the State. Of course, the general school fund of the State is separate and apart from the General Fund of the State, the latter taking care of all the expenses of administering the government of the commonwealth. (The Severance Tax Act, No. 5 of 1928, is quoted in full in the Appendix.)

SPECIFICATIONS OF ERRORS.

While appellees are not required, by the rules of this Court, as is clearly set forth in paragraph 3 of Rule 25 of this Honorable Court, to set forth a specification of errors, we, nevertheless, wish to direct the attention of this Honorable Court to the contentions which appellants now confine themselves to and which they complain of as errors in the judgment of the lower Court.

They contend, first "that the purchasing and supplying of free school books by the State out of public tax funds, for the use of all the school children of the State, including children attending private, religious, sectarian and other schools not embraced in the public educational system of the State is not 'an ordinary obligation and expense of the government'."

Second, that the Court below erred in holding that the purchasing and subsequent granting or lending, of free school books by the State out of "public tax moneys," for the use of all the school children of the State, including children attending private, religious, sectarian and other schools not embraced in the public educational system of the State, is permissible as an exercise of the police power of the State; that it is for a public purpose so as to authorize the expenditure thereof of State funds; that

it does not constitute a taking of the property of plaintiffs, as taxpayers and as patrons of the public schools of the State, without due process of law, in violation of the 14th Amendment to the Constitution of the United States; that it is not in violation of Section 4 of Article IV of the Constitution of the United States which guarantees to every State a Republican Form of Government.

Hence, the appellants confine themselves to the two separate and distinct contentions: (a) That the furnishing of school books to the children of the State is not an ordinary obligation and expense of the Government; and (b) that the furnishing of such books by the commonwealth to its children attending schools, whether public or private, tends to deprive the appellants as taxpayers and patrons of the public schools, of their property without due process of law, and further, that it constitutes a violation of Section 4 of Article IV of the Constitution of the United States which guarantees to every State a Republican Form of Government.

The appellants insist that the question presented here is whether, "under the Federal Constitution, the State, under the guise of taxation, has the right, as interpreted by the highest court of the State, to take private property to aid private, religious, sectarian, and other schools not embraced in the public educational system of the State of Louisiana, by furnishing textbooks free to the children attending such private schools."

We respectfully direct the attention of this Honorable Court to the fact that the State is not levying a tax upon its people for the purpose of purchasing free textbooks for the school children of the State, but is merely using a por-

tion of a special fund created by legislative authority of the State, and known as the "Severance Tax Fund," for the purposes of promoting the education of its children, regardless of whether they attend private or public schools, but directing that this money so expended for the purchase of textbooks shall be done under the supervision of the State Board of Education, and that such books so furnished should constitute only such books as are em-
Legislature or by the Constitution of the State.
braced in the curriculum of the State Board of Education.

ARGUMENT.

Petitioners, EMMETT COCHRAN, WILLIAM M. GUICE, JR., HENRY G. STEINAU, and ALLIE H. TARVER, all residents of the Parish of Caddo, attack the constitutionality of the statutes which are intended to provide free textbooks for the school children of Louisiana.

There were four suits filed by certain residents of practically the same territory, all four of which have been decided adversely to their contentions, and out of these four suits, representing the contentious litigants of that particular section of Louisiana, the above named four plaintiffs remain single and alone in their plea that they are being deprived of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and that the purchase of textbooks, the very purpose of which is to bring enlightenment to the benighted citizens of the State of Louisiana, not only deprives them of their property without due process of law, but tends to destroy the Republican Form of Government guaranteed to each State by the Federal Constitution. The other litigants were content to accept

the judgment of the Supreme Court of Louisiana, to the effect that no Article of the Constitution of Louisiana had been violated, and further, that a Federal question worthy of consideration by this high tribunal did not present itself. But these four plaintiffs, representing an infinitesimal percentage of the now more than two million population of the State of Louisiana, insist that an appropriation made by the Legislature to which they contribute not one cent for the benefit of bringing the youth of the State to a degree of enlightenment, is a sacrilege against the Constitution of the United States, in that it tends to destroy the Republican Form of Government guaranteed by that Constitution to each State and to deprive them of their property without due process of law. Note, then, the allegations of their petition. (R., 1 to 9.)

In paragraph 1 they state that they are citizens and taxpayers, being the owners of both real and personal property, located within the State.

In paragraph 2 it is alleged that the Louisiana State Board of Education is a body politic, organized and existing under the laws of Louisiana, domiciled in the City of Baton Rouge, Parish of East Baton Rouge, Louisiana, with H. H. White as its President.

In paragraph 3 they allege that your petitioners are patrons of the public school system of the State of Louisiana, each having one or more children who have been, are now and will continue for several years hereafter to be enrolled in attendance in the public schools of the Parish and community in which your petitioners live and reside, an allegation, if it pleases the Court, which applies practically to every citizen of the State from the Arkansas line

to the Gulf, and from Mississippi on the East, to Texas on the West.

In paragraph 4 they allege that the State has levied and collected under the provisions of Act 140 of 1922 of the Legislature of Louisiana, and laws amendatory thereof, what is commonly known as a severance tax on the natural resources of the State. But this Honorable Court will observe from that statute that this severance tax is levied upon "all natural resources severed from the soil or water, including all forms of timber, turpentine, and other forest products; minerals, such as oil, gas, sulphur, salt, coal, lignite and ores; also marble, stone, gravel, sand, shells and other natural deposits; * * *."

This Honorable Court will also observe that these four plaintiffs do not aver or allege that they are engaged in any business upon which the Severance Tax is levied.

In the fifth paragraph of their petition, plaintiffs aver that unless the State Board of Education is restrained it will illegally expend and distribute, and will continue to illegally expend and distribute, the Severance Tax Fund as aforesaid, as it accrues in order to supply school books, free of cost, to all the school children of the State of Louisiana, including children attending private, religious, sectarian and other schools not embraced in the public educational system of the State of Louisiana. And even now, is preparing to purchase, and will purchase with the public funds aforesaid, the said school books to be supplied and donated (a gratuitous statement) to the persons aforesaid, the said defendant giving as its authority for said acts, Act No. 100 of the Legislature of Louisiana of 1928,

p. 114, and Act No. 143 of the Legislature of Louisiana of 1928, p. 169.

We believe we have pointed out, and will further accentuate in this brief, the fact that the State, as a commonwealth, owes to its children the duty of bringing them up as good citizens. That the duty of the parent is to send his child to school, and the State may even coerce him by laws to compel the child's attendance in school. There is no question but what the jurisprudence of the entire Nation is that the parent cannot be compelled to send his child to any particular school but rather to the school of his choice, whether it be private, public or sectarian. But the error, which we believe plaintiffs have fallen into, is that the State appears to owe no obligation to its children in the matter of education, except those who elect to attend its public schools.

The members of this Honorable Court may well take judicial cognizance of the fact that from Central Louisiana on down to the Gulf at least, which embraces by far the great bulk of the population of the State, the national census shows that the Catholics and Jews are overwhelmingly in the majority; that if the Catholics and Jews had refrained and refused to vote special taxes for the maintenance of the public schools, there would scarcely be a public schoolhouse located within the limits of that territory. They not only willingly and freely voted these special taxes for the public schools, but out of their own funds maintain private schools for their own denominations, thus more than doubly taxing themselves and evidencing a spirit of liberality in the matter of education

which, in our humble estimation, is most laudable and commendable.

The other sections of the petition of plaintiffs are merely an attack upon the Acts of the Louisiana Legislature referred to, until that part of it is reached and embraced in paragraph 15 of the petition, in which they allege that the expenditure of the public monies of the State, complained of in their petition, is the taking of petitioners' property for private purposes without due process of law, and contrary to the guaranteed Republican Form of Government, in violation of Section 4 of Article IV, and of the Fourteenth Amendment to, the Constitution of the United States.

Insofar as the petition levies an attack against the Acts in question as being in violation of the Constitution of the State of Louisiana, this matter has been fully determined by the highest Court of the State in the case of *Cochran et al. v. Louisiana State Board of Education et al.*, reported in 168 La. 1030, 123 So. 664. Hence, this Court cannot be further concerned with the question of whether or not these Acts violate the Louisiana Constituion, but it must concern itself solely with these two questions:

First, whether the expenditure of the "public monies" of Louisiana for the purpose of free textbooks for the children of the State deprives petitioners of their property without due process of law; and secondly, whether this same expenditure, by any stretch of imagination, tends to destroy the Republican Form of Government guaranteed to the states by the Federal Constitution under the provisions of Section 4 of Article IV of the Federal Constitution, readings as follows:

> "The United States shall guarantee to every state in the Union a Republican Form of Government, and shall protect each of them against invasion; and on application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence."

In our humble estimation, plaintiffs have fallen into two fundamental errors:

> **First:** That the public school funds of the State are being illegally and unconstitutionally expended for the purpose of furnishing free textbooks to the school children attending private and sectarian schools.

Assuming that plaintiffs have fallen into this error, our answer is:

That Act 109 of the Legislature of Louisiana of 1921, p. 233, which is set forth in full in the Appendix to this brief, provides in its title as follows:

> "To provide an annual revenue for the State of Louisiana by the levying of annual taxes upon all property not exempted from taxation; fixing the rates; and setting forth the purposes for which said levying is made; and prescribing the method of assessing and collecting the same; and enforcing payment thereof."

Under the provisions of Section 4 of said Act, paragraph "D", p. 234, it is provided as follows:

> "Two and fifty-hundredths (2.50) mills on the dollar, authorized by Section 14 of Article XII of the Constitution of Louisiana of 1921, be known as the 'Public School Fund' and to be used for the

support of the public schools of the State; provided, that out of the portion of said taxes collected in the City of New Orleans, $50,000.00 shall be paid annually to the Isaac Delgado Trade School."

Section 14 of Article XII of the Constitution of Louisiana of 1921, p. 94, reads as follows:

"Sec. 14. The public school funds of the State shall consist of:

First, The proceeds of two and one-half mills of the taxes levied and collected by the State; provided, that out of the portion of said taxes collected in the city of New Orleans fifty thousand ($50,000.00) dollars shall be paid annually to the Isaac Delgado Trade School.

Second, The proceeds of the poll tax, which shall be applied exclusively to the support of public schools in each parish in which collected, and shall be paid by the tax collector directly to the parish school board.

Third, The interest on the proceeds of land heretofore or hereafter granted by the United States for school purposes, and the revenues derived from unsold portions thereof.

Fourth, All funds and the proceeds of lands and property, other than unimproved lands, heretofore or hereafter bequeathed, granted, or escheated to the State, not designated for any other purpose.

Fifth, Such other funds as the Legislature may appropriate.

All school funds, except the poll tax and the interest on proceeds of land granted by the United States for the support of public schools, shall be distributed to each parish in proportion to the number of children therein between the ages of

six and eighteen years. The Legislature shall provide for the enumeration of educable children."

Section 21 of Act 100 of the Legislature of Louisiana of 1922, p. 211, reads, in part, as follows:

> "The General Fund of the Parish School Board shall consist of the State Current School Fund, Poll Taxes, Fines, Bond Forfeitures, Police Jury appropriations, proceeds from the sale of timber or income from oil or gas, (thereon) in short, all school funds except those voted or appropriated for special purposes."

Hence, we believe we have made it clear just exactly what the Legislature of the State and the Constitution of the State has designated as funds belonging to the public school system of the State.

The Court must bear in mind that the appropriation for the purchase of free textbooks was not made out of any funds dedicated to the General School Fund of the State, nor out of the General Fund of the State, either by the Legislature or by the Constitution of the State.

The Court must further bear in mind that these plaintiffs do not urge that they are engaged in any of the businesses upon which a severance tax is levied by the State of Louisiana. Further, that they do not contest the validity or legality of the Severance Tax Act. Their sole complaint is that the severance tax is being diverted from the public schools of the State for the purpose of supplying textbooks indiscriminately to the school children of the State, whether attending public, private or sectarian schools.

A severance tax has been levied for years by the State of Louisiana upon certain persons severing natural resources of the State from its soil. The tax is not confined to oil, but it applies to timber, gravel, oyster shell reefs, and a variety of its natural resources which hitherto have been utilized indiscriminately by persons or corporations within the State, without a cent of revenue to the State.

Under the very terms of the statutes involved in this litigation, to-wit: Act 100 of the Legislature of Louisiana of 1928, p. 114, and Act 143 of the Legislature of Louisiana of 1928, p. 188, it is provided that this Severance Tax Fund, which constitutes no part of the General Fund of the State, nor of the Public School Funds dedicated to the State of Louisiana, except as hereinafter mentioned, shall first be dedicated to the purchase of school books for school children, and the balance thereafter shall be applied to the Public School Funds of the State. (See Act 100 of 1928, p. 114.)

In the General Appropriation Bill of the State, which is Act 143 of 1928, at page 188, the Court will find that the Legislature appropriated:

> "For purchase of free school books for the use of School Children of this State, to be expended by the State Board of Education of Louisiana as provided by House Bill No. 90 of 1928, (which is Act 100 of 1928) or so much thereof as may be necessary _____ $750,000.00
>
> (After the above appropriations have been paid or provided for, then the balance from said Severance Tax Fund to be transferred to the Cur-

rent School Fund as provided by House Bill No. 90 of 1928)."

Act 100 of 1928, p. 114.

It is, therefore, very clear that the Legislature, in providing for the purchase of free textbooks for the children of the State, has not used one dollar of the Public School Funds of the State for that purpose, nor a dollar of the General Fund of the State, but has done so by appropriating funds derived from its severance taxes which it might have utilized for any purpose whatsoever not inconsistent, of course, with the Constitutions of the State and of the Union.

In *Pierce v. Society of Sisters*, reported in 268 U. S., p. 510, it was said in syllabus No. 1, that:

> "1. The fundamental theory of liberty upon which all governments of this Union rest excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. Id.

The second fundamental error to which we adverted and which we sincerely believe plaintiffs have fallen into, is their contention that the State, in providing free textbooks to its children, is expending its money for the benefit of "private and sectarian schools", in violation of Section 13 of Article XII of the Constitution of Louisiana of 1921, which reads as follows:

> "Sec. 13—No public funds shall be used for the support of any private or sectarian school."

And further, that these funds were being used, loaned, pledged or granted to private persons, in violation of the

provisions of Section 12 of Article IV of the Constitution of Louisiana, reading, in part, as follows:

> "The funds, credit, property or things of value of the State or of any political corporation thereof, shall not be loaned, pledged or granted to or for any person or persons, association or corporation, public or private; * * *."

The assumption of appellants being, of course, that the purchase of free textbooks for the children of the State was an expenditure of the money of the State for the support of private and sectarian schools, in violation of Section 13 of Article XII of the Constitution of Louisiana of 1921, and was further the loaning and pledging of funds of the State for the benefit of private persons, in violation of Section 12 of Article IV of the Constitution of Louisiana of 1921; whereas, the free schooling, or even the furnishing of free textbooks to the school children of the State is not so much a right granted to the pupils as a duty imposed upon them for the public good, and further, a duty likewise resting upon the commonwealth to see that its citizens are not permitted to grow up in ignorance and be deprived of the benefits of even a rudimentary education, simply because of their poverty, when the State in its affluence, without depriving anyone of anything, can well afford to supply them the means of obtaining those simple and fundamental instructions which, of necessity, will tend to develop them into worthy and upright citizens.

In the case of *The Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U. S. 118, the fifth paragraph of the syllabus reads as follows:

> "Where the claim that one taxed under a State statute is deprived of property without due process of law is not based on any inherent defect in the law, or infirmity of power of State to levy it, but on the ground that the government of the State is not republican in form, the question is not within the jurisdiction of the courts."

This represents completely the position of the four plaintiffs in this case. They claim in their petition that they are being deprived of property without due process of law, but they do not and dare not base it upon any inherent defect in the law, that is to say, the Severance Tax Law, which they recognize and admit to be valid; or the infirmity of power of the State to levy it, which they cannot deny because the authority of the State of Louisiana to impose a severance tax remains unquestioned, judicially, even until this day. But on the ground that the government of the State is not republican in form, they seek to impress this Court with the fact that they have a right to complain; whereas, in this very decision just quoted this Honorable Court has laid down the doctrine that the question, being purely political, is not within the jurisdiction of the courts.

The case hereinabove quoted is referred to in the case of *Marshall, Governor of the State of Indiana, v. Dye*, 231 U. S. 250, and in the second paragraph of the syllabus of the latter case, this Court held:

> "The enforcement of the provision of Article IV, Section 4 of the Constitution, that the United States shall guarantee to every State in the Union a Republican Form of Government, depends upon political and governmental action through the

powers conferred on the Congress and not those conferred on the courts."

Pacific Tele. Co. v. Oregon, 223 U. S. 118.

In the case of *Mountain Timber Co. v. Washington*, 243 U. S., p. 219, Syllabus 11, this Court held:

> "Since the question whether a state law deprives of a right secured by the Constitution depends not upon how the law is characterized but upon its practical operation and effect, and since the Constitution does not require a separate exercise of the state powers of regulation and taxation, the crucial question is whether this legislation, be it regarded as an exercise of the power of regulation, or a combination of regulation and taxation, clearly appears to be not a fair and reasonable exertion of governmental power but so extravagant or arbitrary as to constitute abuse of power."

In the case of *State of Ohio ex rel. E. H. Bryant v. Akron Metropolitan Park, District for Summit County*, reported in Vol. 8 of the Advance Opinions of the U. S. Supreme Court, 1929 Term, 74 L. ed. ——, at page 336 this Court held:

> "The question with respect to the validity, from a Federal standpoint, of the provision of the state Constitution that no law shall be held unconstitutional by the supreme court of the state without a concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional, was not raised in these suits until after the judgments of affirmance by the supreme court. But it is insisted that the point could not have

been taken earlier, as in advance of the affirmance on a vote of the minority the question would have been speculative. Hence, it is said that the Federal question was raised at the earliest opportunity. *Saunders v. Shaw*, 244 U. S. 317, 320, 61 L. ed. 1163, 1166, 37 Sup. Ct. Rep. 638.

Assuming that the Federal question is thus brought here, we find it to be without merit.

As to the guaranty to every state of a republican form of government (Sec. 4, Art. 4), it is well settled that the questions arising under it are political, not judicial, in character and thus are for the consideration of the Congress, and not the courts. *Pacific States Teleph. & Teleg. Co. v. Oregon*, 223 U. S. 118, 56 L. ed. 377, 32 Sup. Ct. Rep. 224; *O'Neill v. Leamer*, 239 U. S. 244, 248, 60 L. ed. 249, 263, 36 Sup. Ct. Rep. 54; *Ohio ex rel. Davis v. Hildebrant*, 241 U. S. 565, 60 L. ed. 1172, 36 Sup. Ct. Rep. 708; *Mountain Timber Co. v. Washington*, 243 U. S. 219, 234, 61 L. ed. 685, 694, 37 Sup. Ct. Rep. 260, Ann. Cas. 1917D, 642, 13 N. C. C. A. 927.

As to the due process clause of the 14th Amendment it is sufficient to say that, as frequently determined by this court, the right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance. *McKane v. Durston*, 153 U. S. 684, 687, 38 L. ed. 867, 868, 14 Sup. Ct. Rep. 913; *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 427, 38 L. ed. 1031, 1036, 14 Sup. Ct. Rep. 1114; *Reetz v. Michigan*, 188 U. S. 505, 508, 47 L. ed. 563, 566, 23 Sup. Ct. Rep. 390; *Rogers v. Peck*, 199 U. S. 425, 435, 50 L. ed. 256, 260, 26 Sup. Ct. Rep. 87; *Standard Oil Co. v. Missouri*, 224 U. S. 270, 286, 56 L. ed. 760, 769, 32 Sup. Ct. Rep. 406, Ann. Cas. 1913D, 936."

In the case of *Beach v. Bradstreet*, reported in 82 Atl. 1030, Syllabus 3, the Court said:

"Under Const. U. S. art. 4, Section 4, which provides that the United States shall guarantee to every state a republican form of government, and Const. U. S. Amend. 14, which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, taxes may be imposed only to raise money for a public governmental use or purpose, as the republican form of government forbids the raising of taxes for any but public purposes."

(Ed. Note—For other cases, see *Taxation, Cent. Dig.*, Sec. 67; *Dec. Dig.*, Sec. 38.)

We cannot imagine a greater public purpose than that which unquestionably devolves upon the State to educate its children. It provides for the dipping of its cattle to eliminate the ticks; it provides for the dissemination of vaccine to all persons of all sects, all denominations, all races, and all creeds to prevent smallpox. It has even contributed monies to hatcheries for fish. It has and is authorized by the Legislature to transport children to school, regardless of denomination or creed; to provide for free passage of school children over toll bridges and ferries, and dozens of other statutes looking toward the welfare of the State, affecting either its health, morals or public policy, may be cited. Why, then, should the fact that the State, out of a special fund which does not encroach upon any of the other revenues of the State be condemned for supplying to the school children of the State those books which are needed under the educational system of the State, and how unreasonable, even illegal and unconstitutional, would it be to say, that only those who attend

the public schools shall be supplied with the facilities of learning? Indeed, it is our impression that, under the Constitution of the State of Louisiana, if it had been stipulated that free books should be furnished only to those who attended the public schools of the State it would have been clearly unconstitutional, since there would have been an emphatic discrimination in favor of the children attending the public schools as against those who might desire to attend private schools, and, as already pointed out in this brief, no parent may be compelled by any court to send his child to any particular school, public, private or sectarian.

Further quoting from the case of *Beach v. Bradstreet, supra*, paragraph 6 of the Syllabus reads as follows:

> "A tax levied by the Legislature is for a public purpose, so as to render it constitutional, where it is for the support of government, or for any of the recognized objects of government, or if its proceeds will directly promote the welfare of the community in equal measure."
>
> (Ed. Note—For other cases, see *Taxation, Cent. Dig.*, Sec. 67, *Dec. Dig.*, Sec. 38.)
>
> (For other definitions, see *Words and Phrases*, Vol. 6, pp. 5815-5817; Vol. 8, p. 7773.)

We particularly direct the attention of this Honorable Court to this expression just hereinabove quoted, for the reason, as already stated, that there can be no greater, nobler nor more important public purpose than the education of the citizens of this country. There can be no question that education is, "a recognized object of govern-

ment", nor can there be any dispute that education "will directly promote the welfare of the community in equal measure."

Appellants complain of the fact that they are being deprived of their infinitesimal *pro rata* of a certain sum which the State of Louisiana has appropriated out of its Severance Tax Fund for the purchase of free textbooks. Is it not true that these four plaintiffs are affected just as every other citizen of the State is affected? That is to say, they are suffering no hardship or burden which is not commonly borne by every other citizen of the State. If they are entitled to their individual percentage of the Severance Tax Fund of the State, as citizens of the State, is it not true that every other citizen of the commonwealth is entitled to the same *pro rata* and to the same percentage? And do they suffer to any greater extent, by reason of the allocation of these funds for the purchase of free textbooks for the school children of the State, than does every other citizen of the State, be he or she Jew or Gentile? If those of certain religious faiths, who provide private and sectarian schools for those of their particular denomination, are entitled to as much out of the Severance Tax Fund of the State of Louisiana as these plaintiffs are, then how can plaintiffs contend that they are suffering a deprivation of their property without due process of law?

In *Morgan v. Graham*, 1 Woods', p. 125, the Court said:

> "It is a general rule that a man cannot maintain a private suit for an injury which he sustains in common with every other citizen. To allow such actions would promote endless litigation. Every

> dissatisfied person in the community would institute an action for his supposed grievance. Public officers would be subjected to intolerable prosecution. They would be so harassed thereby, that no competent person would be willing to enter upon any office of general importance. It is not in this way that the public officers are to be called in question for a dereliction of their official duties. The proper administration of the government in its several departments cannot be enforced by private actions brought by any taxpayer or any voter interested in the good government of the country."

Even stronger is the language of this Court in *Commonwealth of Massachusetts v. Andrew W. Mellon*, 262 U. S. 1078, 67 L. Ed. 447, paragraph 6 of the syllabus of which case reads, as follows:

> "6. One who invokes the power of the court to declare an act of Congress to be unconstitutional must be able to show not only that the statute is invalid, but that he has sustained, or is in immediate danger of sustaining, some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

If appellants suffer at all, they merely suffer in some indefinite way in common with the people generally, since they have no right or privilege on the property or the money coming from the Severance Tax Fund of the State of Louisiana, superior to, or of greater priority than, that of any other citizen of the State. If their infinitesimal loss, which would probably approximate 50 cents per individual per annum, is sufficient to deprive them of their property without due process of law, then this same stat-

ute deprives every other citizen of the State of the same amount in the same manner, and hence appellants suffer, if suffer they do, in common with the people of the State generally.

Smith v. Donahue, 195 N. Y. Sup. 715, is a case which appears to be regulated strictly by a statute of the State of New York, and we therefore consider it inapplicable, since it appears that the statute in controversy there expressly prohibits the furnishing of textbooks to persons attending parochial schools.

We respectfully direct the attention of this Honorable Court to the fact that the Louisiana statute makes no distinction between those who attend the various school of the State, and merely provides for the furnishing of books to the children of the State in order that they may obtain an education which the State requires them to obtain by statute, and is absolutely responsible for, to the extent that the State shall see that its children are educated.

However, in the body of the opinion hereinabove referred to, at page 70, it was said by the Court:

> "It was the education of the youth that the state has required, and not this education necessarily in the public schools; but, if the education was to be had in a school other than the public schools, then it was necessary that those schools should be under the inspection of the state authorities. The state authorities have control of the education of the pupil and to require its attendance upon school. In no sense does the state assume to employ teachers of schools other than the public schools; but it insists that in all schools other than the public schools, where children of compulsory school age

are attending, the teachers must have the required qualifications, and there must be examinations to test the work done, and there must be attendance officers to insure attendance."

We respectfully direct the attention of this Honorable Court to the fact that the school books supplied to the school children of Louisiana are supplied by and through the State Board of Education, and only the books prescribed by said Board, whether they be used in public, private or sectarian schools, are the books which are supplied under the statutes of Louisiana providing for the furnishing of free textbooks to school children. (See Addition to record—Testimony of State Superintendent Harris and annexed documents), which we are unable to cite specifically in this brief, for the reason that we have not yet been supplied with a printed copy of this Addition to the Record.

AUTHORITIES OF APPELLANTS IN SUPPORT OF THEIR CONTENTION THAT PRIVATE SCHOOLS DO NOT COME UNDER THE CATEGORY OF PUBLIC USE.

An examination of the cases cited by appellants in their brief, in which they argue that private schools do not come under the category of public use (p. 12, *et seq.*), shows that in no instance was the appropriation made in aid of the children of the State, or even of the children of any particular school. In every instance the appropriation for aid was given to a college, academy, private school, or to some corporation or association organized

for some eleemosynary purpose.

For instance:

Curtis v. Whipple, 24 Wis. 350, concerns a tax to aid the "Jefferson Liberal Institute."

Jenkins v. Andover, 103 Mass. 94, contemplates taxation to aid in rebuilding "Punchard Free School."

Underwood v. Wood, 93 Ky. 177, contemplates aid to an academy.

Smith v. Donahue, 195 N. Y. Sup. 715, concerns books procured by the Board of Education and delivered to schools. The statute there involved specifically required that the books should be furnished to children attending the public schools, and the attempt to furnish them to other schools was, therefore, recognized by the Court as a violation of the New York statute. That case is easily differentiated from the present case, in that the Louisiana statute requires that the textbooks shall be furnished to all the school children of the State.

Dakota Synod v. State, 2 S. D. 366. contemplates payment by the State to a sectarian university for the tuition of a designated class of students.

Williams v. Stanton Graded Common School District, 173 Ky. 708, contemplates direct payment to a college in consideration of tuition to certain students.

State v. Switzler, 143 Mo. 287, contemplates payment to a university for the use of individuals.

The above covers practically all of the cases cited by appellants on this subject, and are manifestly not applicable to the case at bar.

The case of *Loan Association v. Topeka*, 20 Wall. 655, 22 L. ed. 455, contemplates aid by way of taxation to certain manufacturers, particularly to a bridge and iron company, to encourage the establishment of shops in the city of Topeka.

This case is not in point, but even if it were, it was decided fifty-six years ago, and was a border line case even at that time, because the court held then that the line which distinguishes a public use from a private use is not easy to discern.

We would add, quoting the decision in *Mutual Oil Company v. Zehrung*, 11 F. (2d) 887, (l.c.) 891:

> "In many instances states and municipalities have in late years seen fit to enter upon projects to promote the public welfare, which in the past have been considered entirely within the domain of private enterprises."

In other words, the police power of the State is with propriety being considerably extended.

Beveridge, in his Life of Chief Justice Marshall, (Vol. 1, p. 162), says that Marshall could not get a permit from the State of Virginia to be vaccinated and had to make a long trip on foot and on horseback to Philadelphia for that purpose. The police power of the State now is extended in Louisiana and in practically all of the states, so as to embrace compulsory vaccination, testing of eyes, examinations for nose and throat diseases, etc., to all the children of the State, including those who attend public schools, private schools and no schools at all.

The answer to appellants' brief has been given many times heretofore in this brief, but can be condensed again into the statement that the furnishing of free textbooks to the children of the State is not a grant in aid of the schools nor of individuals, but is in aid of education, a matter of public welfare, of public concern and benefit, and for a distinct public purpose more important by far, we imagine, than anything the State might attempt to do for its citizens.

POLICE POWER.

EDUCATION IS ONE OF THE PURPOSES FOR WHICH THE POLICE POWER OF THE STATE MAY BE EXERCISED.

In *Barbier v. Connolly*, 113 U. S. 27, in the second paragraph of the syllabus, it is set forth that the Fourteenth Amendment of the Constitution does not impair the police power of the State.

Article XIX, Section 18, of the Constitution of Louisiana of 1921, provides:

> "Sec. 18. The exercise of the police power of the State shall never be abridged."

This is identical with Article 263 of the Constitutions of Louisiana of 1898 and 1913, and in perfect consonance with similar provisions in prior constitutions.

The police power of the State extends to the protection of lives, limbs, health, comfort, morals, and quiet of society. While this definition is incomplete insofar as it might

attempt to cover what is meant by the police power, later decisions have enlarged upon this definition so as to accept the doctrine that the term "police power" authorizes the prescription of regulations to promote health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and all of its wealth and prosperity.

The following authorities bear out this interpretation:

Holden v. Hardy, 169 U. S. 366.
Dent v. West Virginia, 129 U. S. 114.
Mulger v. Kansas, 123 U. S. 623.
Munn v. Illinois, 94 U. S. 113.
Budd v. New York, 143 U. S. 517.
Smyth v. Ames, 169 U. S. 466.

So that, education is certainly one of the purposes for which the police power of the State may be exercised, and the authorities quoted in this brief are not in conflict with the theory that the State, in the legitimate exercise of its police power may provide for the education of its children just as it is entitled to provide for the good morals, peace, and good health of the members of the commonwealth.

We repeat that education is supreme as a beneficial measure in the interest of the citizenship of any State. Where there is no education, necessarily there is dense ignorance and superstition. But in educated communities the burden upon the State to provide laws for its health, peace and morals is lessened because the enlightenment of education trains its citizens to the point where many things can be accomplished without, at the last resort, depending upon the State to improve health, peace, morals, or to increase the industries of the State, or to de-

velop its resources and to utilize its wealth and prosperity.

As a closing statement to this particular heading, we respectfully quote from *Barbier v. Connolly*, 113 U. S., p. 31, wherein a discussion of the Fourteenth Amendment was under consideration, reading as follows:

> "But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its

operation it affects alike all persons similarly situated, is not within the amendment."

Hence, we again respectfully direct the attention of this Court to the fact that no nobler public purpose, to promote the general good, could be assumed by the State than to provide for the education of its children. Certainly, this is more necessary, we think, than supplying water for the sprinkling of streets, lighting districts, opening parks, or such other purposes (important as they are) as this Court and all other courts have time and again recognized as a legitimate exercise of the police power.

RENEWAL OF MOTION TO DISMISS.

Without attempting to argue the Motion to Dismiss hitherto filed by the appellees in this case, we respectfully direct the Court's attention to the brief setting forth statement in support of motion to dismiss for want of jurisdiction, and we now, if permissible, desire to incorporate in this reference the original Motion to Dismiss together with the authorities submitted in support thereof, brief in behalf of which has already been filed with this Honorable Court.

CONCLUSION.

The appellees are convinced, first, that this Honorable Court has no jurisdiction. Secondly, that if it has jurisdiction the appellants have failed to establish any right or interest which they have, sufficient to convince this Court that such interest as they may have is different from that which any other citizen of the State of Louisiana has in this particular proceeding.

If this Court believes that appellees are being deprived of property without due process of law, then this Court must necessarily concede that every other person of the State is similarly situated and the authorities are plain and clear that where a common injury, if injury there is, is suffered by all the citizens equally, there is no justification for the interference of the Federal Tribunal.

We further point out, that the third contention of appellants to the effect that the enforcement of the free Textbook Law of Louisiana tends to destroy the Republican Form of Government guaranteed to each State by the Federal Constitution, Sec. 4, Article IV, is almost a mythological proposition, since that Article and section seems to have very little bearing upon the proposition submitted by the appellants. But if it should have, this Court has already determined that this particular question is purely political and not one for judicial determination.

We, therefore, respectfully pray that the judgment of the lower Court be affirmed at the cost of appellants.

Respectfully submitted,

PERCY SAINT,
Attorney General;
PEYTON R. SANDOZ,
Asst. Attorney General.

H. H. WHITE,
WALTER J. BURKE,
WHITE, HOLLOMAN & WHITE,
BURKE & SMITH,
Of Counsel.

APPENDIX

TRANSPORTATION ON ALL STREET RAILWAYS AND SUBURBAN RAILROADS FOR CHILDREN ATTENDING SCHOOLS.

Act 238 of 1916, p. 507, amending and re-enacting Sections 1 and 2 of Act 197 of 1914.

FERRIES REQUIRED TO TRANSPORT SCHOOL CHILDREN FREE OF CHARGE.

Act 142 of 1918, p. 247, and also Section 61 of Act 100 of 1922, p. 204.

TRANSPORTATION OF SCHOOL CHILDREN AT EXPENSE OF PARISH SCHOOL BOARDS.

Section 29, Act 100 of 1922, p. 213, provides as follows:

> "The Parish School Boards shall have authority to provide transportation for children living more than two miles from a school of suitable grade."

A school of suitable grade, within the intendment of this Act, is any school, public or private, which the State Board of Education recognizes as within the rules and regulations which it prescribes for the education of children.

FISH HATCHERIES.

The Acts relating to appropriations for fish hatcheries are, as follows:

Act 81 of 1926, p. 104,
Act 109 of 1926, p. 169,
Act 185 of 1926, p. 292.

The appropriation in Act 109 of 1926, p. 169, has just been upheld by a decision of the Supreme Court of this State rendered on March 31, 1930, not yet reported.

DIPPING OF CATTLE.

The statutes of the State, with reference to the eradication of the tick, are incorporated in Acts 124 of the General Assembly of Louisiana of 1916, p. 285; Act 25 of the Extra Session of the General Assembly of Louisiana of 1917, p. 34; and Act 254 of the General Assembly of Louisiana of the year 1920, p. 491.

VACCINATION.

With reference to the vaccination of school children, see Article 20, Sanitary Code of Louisiana, as amended. p. 11, Sections "b" and "c".

ACT No. 109.

House Bill No. 154 By Mr. Dreyfus.

AN ACT

To provide an annual revenue for the State of Louisiana, by the levying of annual taxes upon all property not exempted from taxation; fixing the rates; and setting forth the purposes for which said levy is made; and prescribing the method of assessing and collecting the same; and enforcing the payment thereof.

SECTION 1. Be it enacted by the Legislature of Louisiana, That for the calendar year one thousand nine hundred and twenty-two (1922), A. D., and each succeeding

calendar year, there are hereby levied for State purposes, annual taxes amounting in the aggregate to five and one-quarter mills (.005¼) on the dollar of the assessed value of all property situated within the State of Louisiana, except such as is especially exempted from taxation by law, and all property subject to taxation shall be assessed for State purposes, as herein provided, at actual cash value.

SECTION 2. That the term "property" as herein used shal embrace and include every form, character and kind of property, real, personal, and mixed, tangible and intangible, corporeal and incorporeal, and every share, right, title or interest therein or thereto and every right, privilege, franchise, patent, copy-right, trade-mark, certificate, or other evidence of ownership or interest; bonds, notes, judgments, credits, accounts, or other evidence of indebtedness, and every other thing of value, in possession, on hand, or under the control, at any time during the calendar year for which taxes are levied, within the State of Louisiana, of any person, firm, partnership, association of persons or corporation, foreign or domestic, whether the same be held, possessed, or controlled, as owner, agent, pledgee, mortgagee, or legal representative or as president, cashier, treasurer, liquidator, assignee, master, superintendent, manager, sequestrator, receiver, trustee, stakeholder, depository, warehouseman, keeper, curator, executor, administrator, legatee, heir, beneficiary, parent, attorney, usufructuary, mandatory, fiduciary, or other capacity, whether the owner be known or unknown.

SECTION 3. That there shall be exempt from taxes levied by this act all property which is declared to be exempt from taxation by Section 4 of Article X of the Con-

stitution of 1921, and no other; but all real estate, exempt as well as taxable, shall be valued at actual cash value, listed on the assessment rolls and submitted to the Louisiana Tax Commission.

SECTION 4. That the said annual taxes hereby levied for the calendar year one thousand nine hundred and twenty-two (1922), and each succeeding calendar year, are for the following purposes, to-wit:

First: One and fifteen hundredths (1.15) mills on the dollar, to be known as the "State Bond and Interest Tax Fund", for the following purposes:

a. To pay the interest on the new serial gold bonds of the State of Louisiana, authorized by Article 324 of the Constitution of 1913, and by Article XXII, Section 1, paragraph 5, of the Constitution of 1921, and the gradual retirement of said bonds, in accordance with the afore-mentioned articles.

b. To pay the interest on the "Free School Fund", as provided by Article XII, Section 19, of the Constitution of 1921.

c. To pay the interest on the "Seminary Fund", as provided by Article XII, Section 20, of the Constitution of 1921.

d. To pay the interest on the "Agricultural and Mechanical College Fund", as provided by Article XII, Section 21, of the Constitution of 1921.

Provided, That when the revenue collected from the foregoing levy shall exceed the sum of seven hundred thousand dollars ($700,000.), in any one year, the State Auditor and the State Treasurer are hereby authorized and directed to transfer the excess over said amount to the "General Fund".

Second: Two and fifty hundredths (2.50) mills on the dollar authorized by Section 14 of Article XII of the Constitution of 1921, to be known as the

"Public School Fund," and to be used for the support of the public schools of the State: Provided, that out of the portion of said taxes collected in the city of New Orleans, fifty thousand dollars ($50,000) shall be paid annually to the Isaac Delgado Trade School.

Third: Seventy-five hundredths (0.75) of one mill on the dollar authorized by Section 3 of Article XVIII of the Constitution of 1921, to be known as the "Confederate Veteran Fund", to provide pensions for Confederate Veterans and their widows; Provided, that should the revenues collected from this levy in any one year exceed the amount necessary to provide such pensions as may be allowed by law to Confederate Veterans and their widows under the authority of the aforementioned article, the excess over such amount shall be transferred to the "General Fund".

Provided, further, that this tax shall be assessed and collected without charge.

Fourth: Thirty-two hundredths (0.32) of one mill on the dollar to be known as the "General Engineer Fund", for the maintenance and repair of levees.

Fifth: Fifty-three hundredths (0.53) of one mill on the dollar, to be known as the "General Fund", for the following purposes:

a. To carry on and maintain the government of the state and the public institutions thereof.

b. To suppress insurrection, repel invasion or defend the state in time of war.

c. To preserve the public health.

d. To establish markers or monuments commemorative of the services of Louisiana soldiers.

e. To maintain a memorial hall in New Orleans for the collection and preservation of relics and memorials of wars.

SECTION 5. That in addition to the taxes levied in the amount and for the purposes designated in the foregoing sections of this act there is hereby levied for the calendar year one thousand nine hundred and twenty-two (1922), A. D., and each succeeding calendar year, for State purposes, to be paid into the General Fund, an annual tax of twenty-five mills (.025) on the dollar of the assessed value of all rolling stock of non-resident persons, firms, partnerships, companies, associations or corporations, having no domicile in the State of Louisiana, operated over any railroad in the State of Louisiana within or during any year for which such tax is levied; and the term "rolling stock" as used herein shall include any kind of locomotive, car or sleeping car used for freight or passenger purposes that may be so operated over any railroad within the State.

SECTION 6. That the rolling stock of persons, firms, partnerships, companies, associations or corporations subject to the additional tax levied by the foregoing section shall be assessed at actual cash value by the Louisiana Tax Commission upon an assessment roll to be prepared by it, and the taxes levied by Section 1 and Section 5 of this act shall be extended upon such roll by the said Louisiana Tax Commission. Such roll shall be made in triplicate, and it shall be the duty of the Louisiana Tax Commission, on or before the first day of October of each year, to file one copy thereof with the Auditor of Public Accounts of the State of Louisiana and one copy with the Sheriff and Ex-Officio Tax Collector of the Parish of East Baton Rouge, retaining one copy in its office. The correctness of the several copies of such roll shall be duly certified by the Louisiana Tax Commission.

SECTION 7. That it shall be the duty of the Sheriff and Ex-Officio Tax Collector of the Parish of East Baton Rouge to collect the taxes extended upon the roll so made and filed in his office by the Louisiana Tax Commission, and make settlement with the State Auditor and State Treasurer as provided by law for other State taxes collected by him.

SECTION 8. That all of the provisions of Act No. 9 of the Extra Session of the General Assembly of 1917 relating to the assessment and taxation of rolling stock of persons, firms, partnerships, companies, associations or corporations, whether domiciled within or without the State of Louisiana, in so far as they may be applicable hereto and not inconsistent herewith, shall be and remain in full force and effect.

SECTION 9. That all existing laws and parts of laws relating to the assessment, levy, review, equalization and collection of taxes, and procedure for the enforcement of the same, not inconsistent herewith, are hereby declared to be and shall remain in full force and effect; and all laws or parts of laws in conflict herewith are hereby repealed.

Approved: By the Lieutenant-Governor and Acting Governor. November 18, 1921.

A true copy:

JAMES J. BAILEY,
Secretary of State.

ACT NO 140

House Bill No. 411

By Mr. Dreyfus, Chairman of The Ways and Means Committee, Substitute for House Bill No. 15 by Mr. Schell.

AN ACT

To carry into effect Section 21 of Article 10 of the Constitution of 1921 by levying a tax upon all natural resources severed from the soil or water; including all forms of timber, turpentine and other forest products; minerals, such as oil, gas, sulphur, salt, coal, lignite and ores; also marble, stone, gravel, sand, shells, and other natural deposits; fixing liability for, and prescribing the method of collecting and enforcing the payment of such tax; requiring those engaged in the severance of, and dealing in, such natural resources to make reports of their business as may be necessary for the proper enforcement of this Act; to provide penalties; and to provide for the imposition and payment of the license tax due and to become due under Act 31 of 1920 and other laws, and as herein provided.

SECTION 1. Be it enacted by the Legislature of Louisiana, That for the year 1923, and for each subsequent year, taxes as authorized by Section 21 of Article 10 of the Constitution of 1921, are hereby levied upon all natural resources severed from the soil or water; including all forms of timber, turpentine and other forest products; minerals, such as oil, gas, sulphur, salt, coal, lignite and

ores; also marble, stone, gravel, sand, shells and other natural deposits.

Such taxes shall be paid by the owner or proportionately by the owners thereof at the time of the severance, and become due and exigible quarterly, as herein provided; and they shall operate as a first lien and privilege on such natural resources, which lien and privilege shall follow said natural resources into the hands of third persons whether in good or bad faith, and whether the same be found in a manufactured or unmanufactured state.

SECTION 2. For the purposes of taxation natural resources severed from the soil or water shall be divided into two classes, on which taxes are hereby levied and shall be paid at the following rates:

On oil and gas, three per centum (3%) of the gross market value of the total production thereof:

On all other natural resources, two per centum (2%) of the gross market value of the total production thereof.

For the purposes of this Act said gross market value of each such product or natural resource shall be computed in its unmanufactured state, and as of the time when, and at the place where, it was severed or taken from the soil or water.

SECTION 3. All such taxes shall be collected quarterly by the respective sheriffs and Ex-Officio Tax Collectors of the several parishes from within which the natural resources are severed, and by them shall be paid into the State Treasury as collected, and in the same manner and

at the same time as required by law for other State collections.

When so paid into the State Treasury, two-thirds (2/3) of the severance taxes collected on oil and gas, together with all of the severance taxes collected on all other natural resources severed from the soil or water, shall be credited by the Auditor and Treasurer to a special fund, which is hereby created, to be known as the Severance Tax Fund of the State of Louisiana.

The remaining one-third (1/3) of the severance taxes collected on oil and gas is hereby allocated to the parish from within which such taxes are collected, and shall be credited to such parish by the Auditor and Treasurer, provided such allocation and credit shall not exceed two hundred thousand dollars ($200,000.00) in any parish in any one year. When this limit of two hundred thousand dollars ($200,000.00) shall have been reached, there shall be no further allocation, and all additional collections for the year shall be credited in full to the Severance Tax Fund hereinbefore created.

SECTION 4. The amounts allocated and credited to each oil and gas producing parish under this Act, shall be apportioned and distributed quarterly among the parish schools, and such district governing authorities as have jurisdiction over the territory from within which such resources are severed and tax collected.

Such apportionment and distribution shall be made within the first fifteen days of each calendar quarter by the Auditor and Treasurer in proportion to the amount of advalorem property taxes payable to each such governing authority as shown by the last completed assessment

roll, and shall cover all amounts allocated and credited to the parishes during the preceding quarter.

SECTION 5. Every person, firm, corporation or association of persons severing any natural resources from the soil or water in this State shall, within thirty (30) days after the expiration of each quarter-annual period expiring, respectively, on the last day of March, June, September and December of each year, file with the Supervisor of Public Accounts a statement under oath, on forms prescribed by him, of the business conducted by such person, firm, corporation or association of persons during the last preceding quarter-annual period, showing the kind of natural resources so severed or produced, the gross quantity and actual cash value thereof, the names of the owners at the time of severance, the portion owned by each, and such other reasonable and necessary information pertaining thereto as the Supervisor of Public Accounts may require for the proper enforcement of the provisions of this Act. There shall also be shown on such quarterly reports the location of each such natural resource and the place or places where produced or severed from the soil or water.

At the time of rendering such quarter-annual report, each person, firm, corporation or association of persons shall concurrently file a duplicate thereof with the tax collector of the parish where said natural resource is taken or severed from the soil or water; and shall pay to the said tax collector a tax of 3% on the gross market value of the total amount of oil and gas, and a tax of 2% on the gross market value of the total amount of all other natural resources severed from the soil or water during the preceding three months.

SECTION 6. Except as otherwise provided in this Act, the making of said reports, and the payment of said taxes, shall be by those actually engaged in the operation of severing, whether it be the owner of the soil, or other person severing from the soil of another, or the owner of any such natural resource severing from the soil of another.

The reporting taxpayer shall collect or withhold out of the value of the products severed, the proportionate parts of the total tax due by the respective owners of such natural resources at the time of severance.

SECTION 7. Every person, firm, corporation or association of persons actually engaged in severing oil, gas, or other natural resources from the soil or water, or actually operating oil or gas property, or other property from which natural resources are severed, under contracts or argeements requiring payment direct to the owners of any royalty interest, either in money or in kind, is hereby authorized, empowered and required to deduct from any amount due, or from anything due, the amount of the tax herein levied before making such payments.

SECTION 8. When any person, firm, corporation or association of persons actually engaged in severing oil or gas, or other natural resources from the soil or water, under contracts or agreements requiring payments direct to any owner of the proportionate share of such natural resource, as set out in the preceding section, shall sell such oil or gas, or other natural resource to any person, firm, corporation or association of persons, under contracts or agreements requiring such purchasers to pay all owners of such natural resources direct then, the person, firm, cor-

poration or association of persons actually severing such natural resources from the soil or water, or actually operating such oil or gas property, may not be required to deduct the tax herein levied, but in which event such deduction shall be made by the purchaser before making payments to each owner of such oil, gas or other natural resources; provided that nothing herein shall be construed as releasing the person, firm, corporation or association of persons severing the products from liability for the payment of said taxes.

SECTION 9. Every person, firm, corporation or association of persons purchasing oil, gas or any other natural resources severed from the soil or water, under contracts or agreements requiring such purchaser to make payment direct to the owners of such oil, gas, or other natural resource, is hereby authorized, empowered and required to deduct from any amount due any owner of such natural resource the amount of the tax levied by the provisions of this Act before making such payments.

All persons, firms, corporations or associations of persons required to deduct from amounts due to others the tax herein levied shall file with the Supervisor of Public Accounts, and with the tax collector of the parish where such natural resource is severed from the soil or water, the reports herein required, and shall at the same time pay to the said tax collector the amount of the tax thus deducted or withheld under the provisions of this Act; provided that nothing herein shall be construed as releasing the person, firm, corporation or association or persons severing the resources from liability for the payment of said taxes.

SECTION 10. Whenever the title to any natural resources being severed from the soil or water is in dispute, or whenever the purchaser of such natural resources, or any person, firm, corporation or association of persons engaged in severing natural resources from the soil or water, or in the actual operation of oil or gas property, shall be withholding payments on account of litigation, or for any other reason, such purchaser of natural resources severed from the soil or water, or person, firm, corporation or association of persons actually engaged in severing such natural resources from the soil or water, or the actual operation of oil or gas properties, is hereby authorized, empowered and required to deduct from the gross amount thus held the amount of the tax herein levied, and to make remittance thereof to the tax collector of the parish wherein such natural resources are severed, as herein provided.

SECTION 11. The owners of natural resources severed from the soil or water are hereby made proportionately responsible for the payment of the tax herein levied, and if the tax due on such natural resources severed from the soil or water is not paid by the purchaser thereof, or by the person, firm, corporation or association of persons actually engaged in severing such natural resources from the soil or water, or operating oil or gas properties, then the Supervisor of Public Accounts shall make, in any manner feasible, and cause to be recorded in the mortgage records of the parish where such natural resources are severed from the soil or water, a statement under oath showing the proportionate amount of the tax due by each said owner of the natural resources severed from the soil or water, which statement when filed for record, shall

operate as a first lien, privilege and mortgage on all of the property from which the resources were severed and on all the property of the respective tax debtors as the case may be, and said property shall be subject to seizure and sale for the payment of the taxes due; provided nothing herein shall be construed as waiving or releasing the privilege on the resources severed wherever found.

SECTION 12. Whenever the Supervisor of Public Accounts shall cause the statement provided for in the preceding section to be recorded, he shall give notice to the tax debtor by registered letter of the recordation of such statement, and fifteen days thereafter the said Supervisor of Public Accounts shall cause the sheriff and tax collector of the parish wherein such natural resources are severed, to seize and sell, for the payment of such taxes, any property belonging to the tax debtor, or tax debtors, as provided above, which may be found within the jurisdiction of the said sheriff and tax collector.

SECTION 13. The sheriff and tax collector of any parish, when requested by the Supervisor of Public Accounts, is hereby required to seize and sell any property, assets and effects belonging to any person, firm, corporation or association of persons owing the tax herein levied on any natural resource severed from the soil or water, after the recordation of the statement required in Section 11, and after the notice required in Section 12 has been given; and all such seizures and sale shall be conducted in the manner and form now required for the sale of similar property for taxes, and penalties shall be imposed and collected as prescribed herein and by general laws.

SECTION 14. All oil and gas leases, interest in minerals, mineral rights, royalty interests, timber contracts, and rights of any kind to the ownership of any natural resource severed from the soil or water, are hereby declared to be subject to seizure and sale for the payment of the tax herein levied in preference to all other claims, liens and privileges.

SECTION 15. The tax provided by this Act shall become delinquent after the date fixed for each quarter-annual report to be filed in the office of the Supervisor of Public Accounts, and from such time shall, as a penalty for such delinquency, be subject to a penalty of 2% per month and other penalties provided in the general revenue laws of this State.

The payment of the severance tax levied by this Act shall be in addition to, and shall not affect the liability of the parties so taxed for, the payment of all state, parochial, municipal, district and special taxes levied upon their real estate and other corporeal property; but no further or additional tax or license shall be levied or imposed upon oil or gas leases or rights; nor shall any additional value be added to the assessment of land by reason of the presence of oil or gas therein or their production therefrom. No severance tax or license shall be levied or imposed by any parish or other local subdivision of the State.

SECTION 16. The Supervisor of Public Accounts shall have the power to require any person, firm, corporation or association of persons engaged in severing natural products from the soil or water to furnish any additional information by him deemed to be necessary for the purpose of computing the amount of said tax; and for said pur-

pose to examine the books, records and files of such person, firm, corporation or association of persons; and, to that end, shall have the power to examine witnesses, and if any such witness shall fail or refuse to appear at the request of the Supervisor of Public Accounts, or refuse access to books, records and files, said Supervisor of Public Accounts shall certify the facts and the name of the witness so failing or refusing to appear, or refusing access to books and papers, to the District Court of the State having jurisdiction of the party; and said Court shall thereupon issue a summons to the said party to appear before the said Supervisor, or his assistant, at a place designated within the jurisdiction of the Court, on a day fixed, to be continued as occasion may require, and give such evidence, and open for inspection such books and papers as may be required, for the purpose of ascertaining whether or not any return so made is the true and correct return as herein required; and whenever it shall appear to the Supervisor that any such person, firm, corporation or association of persons engaged in severing such natural products from the soil or water has unlawfully made an untrue and incorrect return, as herein provided, said Supervisor shall correct the return and shall compute said tax on same, and certify the same to the tax collector for collection.

SECTION 17. If any person, firm, corporation or association of persons shall fail to make a report of the gross production and value of its natural products (upon which the severance tax is herein levied) within the time and in the manner prescribed by law for such report, it shall be the duty of the Supervisor of Public Accounts to examine the books, records and files of any such person, firm,

corporation or association of persons to ascertain the amount and value of such production and to compute the tax thereon as provided herein, and according to the procedure hereinbefore provided, where witnesses refuse to testify, or access to books and papers is refused, and shall add thereto the cost of such examination, together with any penalties accruing thereon.

SECTION 18. Any person who shall intentionally make any false oath to any report required by the provisions of this Act shall be denied guilty of perjury and shall be subject to all penalties prescribed for said crime.

SECTION 19. It is hereby made the duty of the Supervisor of Public Accounts to supervise and enforce the collection of all taxes that may be due under the provisions of this Act; and, to that end, the said Supervisor is hereby vested with all of the power and authority conferred by this Act.

SECTION 20. It is hereby made the duty of all purchasers and others dealing in any natural products severed from the soil or water in Louisiana to file quarterly with the said Supervisor of Public Accounts a statement, under oath, showing the names and addresses of all persons, firms, corporations, or associations of persons from whom each said purchaser or dealer has purchased any natural product severed from the soil or water in Louisiana during said quarter; together with the total quantity of, and gross price paid for, each such natural product. Said reports shall be filed within thirty (30) days after the expiration of each quarter, and shall be made on such forms as may be prescribed by said Supervisor of Public Accounts. The

failure of any person, firm, corporation or association of persons to make reports as herein provided shall be punished by fine of not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00) for each such offense.

SECTION 21. Nothing contained in this Act shall be construed as in any wise impairing or depriving the State of Louisiana of any rights and claims whatsoever it may have for the license tax due or to become due under Act 31 of 1920 and other laws, and as herein provided; said rights and claims being hereby specially reserved, whether they be in litigation or not, and all proceedings pending or which may be brought shall be prosecuted as though this Act had not been enacted; provided that said license tax is hereby imposed and shall be collectible in accordance with the provisions of said Act 31 of 1920 up to and until the time herein prescribed for the reports and payments of the severance tax levied and as levied by this Act; it being the true intent and purpose of this Act that said license tax shall be imposed and collected until the time aforesaid; and provided further that all funds thus collected shall be paid into the Severance License Tax Fund as heretofore.

SECTION 22. If any clause, sentence, paragraph, or part of this Act shall, for any reason, be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of this Act, but shall be confined in its operation to the clause, sentence, paragraph, or any part thereof, directly involved in the controversy in which such judgment has been rendered.

SECTION 23. This Act shall become effective in accordance with all its terms and conditions from and after the 31st day of December, 1922.

Approved by the Governor:

July 14, 1922, 8:40 A. M.

A true copy:

JAMES J. BAILEY,

Secretary of State.

COPY COPY

ACT NO. 5.

House Bill No. 89, By Mr. McClanahan.

AN ACT

To amend and re-enact Sections 2 and 5 of Act 140 of 1922, and entitled:

"An Act to carry into effect Section 21 of Article 10 of the Constitution of 1921 by levying a tax upon all natural resources severed from the soil or water; including all forms of timber, turpentine and other forest products; minerals, such as oil, gas, sulphur, salt, coal, lignite, and ores; also marble, stone, gravel, sand, shells, and other natural deposits; fixing liability for, and prescribing the method of collecting and enforcing the payment of such tax; requiring those engaged in the severance of, and dealing in, such natural re-

sources to make reports of their business as may be necessary for the proper enforcement of this Act; to provide penalties; and to provide for the imposition and payment of the license tax due and to become due under Act 31 of 1920 and other laws, and as herein provided," and to amend and re-enact section 3 thereof, as amended and re-enacted by Act No. 301 of 1926.

SECTION 1. Be it enacted by the Legislature of Louisiana, That Section 2 of Act 140 of 1922, entitled:

"An Act to carry into effect Section 21 of Article 10 of the Constitution of 1921 by levying a tax upon all natural resources severed from the soil or water; including all forms of timber, turpentine and other forest products; minerals, such as oil, gas, sulphur, salt, coal, lignite and ores; also marble, stone, gravel, sand, shells and other natural deposits; fixing liability for, and prescribing the method of collecting and enforcing the payment of such tax; requiring those engaged in the severance of, and dealing in, such natural resources to make reports of their business as may be necessary for the proper enforcement of this Act; to provide penalties; and to provide for the imposition and payment of the license tax due and to become due under Act 31 of 1920 and other laws, and as herein provided." be amended and re-enacted so as to read as follows:

SECTION 2. Taxes on natural resources severed from the soil or water, as levied by Section 1 of this Act, shall be predicated on the quantity severed, and shall be paid at the following rates:

(1) On cypress timber, twenty-six (26) cents per thousand feet, log scale.

(2) On second growth or old field pine timber, seven (7) cents per thousand feet, and on virgin pine timber seventeen (17) cents per thousand feet, log scale.

(3) On ash and hickory timber, twenty-four (24) cents per thousand feet, log scale.

(4) On cottonwood, red gum, magnolia, oak, poplar and sycamore timber, twelve (12) cents per thousand feet, log scale.

(5) On tupelo gum, black gum and sap gum timber, seven (7) cents per thousand feet, log scale, and on all other hardwoods ten (10) cents per thousand feet, log scale.

(6) On turpentine, (crude gum), ten (10) cents per barrel of 400 pounds.

(7) a. On oil of 28° gravity and below, four (4) cents per barrel of 42 gallons.

b. (1) On oil above 28° gravity and not above 31° gravity, four and one-fourth (4¼) cents per barrel of 42 gallons.

b. (2) On oil above 31° gravity and not above 32° gravity, five (5) cents per barrel of 42 gallons.

(c.) On oil above 32° gravity and not above 36° gravity, eight (8) cents per barrel of 42 gallons.

(d.) On oil above 36° gravity and not above 43° gravity, ten (10) cents per barrel of 42 gallons.

(e.) On oil above 43° gravity, eleven (11) cents per barrel of 42 gallons.

(8) On gas, one-fifth (1/5th.) of one cent (1c) per thousand cubic feet, measured at ten ounce (10 oz.) pressure.

(9) On sulphur, fifteen (15) cents per ton of two thousand pounds.

(10) On salt, four (4) cents per ton of two thousand pounds.

(11) On coal, five (5) cents per ton of two thousand pounds.

(12) On lignite, five (5) cents per ton of two thousand pounds.

(13) On ores, five (5) cents per ton of two thousand pounds.

(14) On marble, ten (10) cents per ton of two thousand pounds.

(15) On stone, one and one-half (1½) cents per ton of two thousand pounds.

(16) On gravel, one and one-half (1½) cents per ton of two thousand pounds.

(17) On sand, one (1) cent per ton of two thousand pounds.

(18) On shells, one and one-half (1½) cents per ton of two thousand pounds.

SECTION 2. That section 3 of Act 140 of 1922, as amended and re-enacted by Act 301 of 1926, be amended and re-enacted so as to read as follows:

"SECTION 3. All such taxes shall be collected quarterly by the respective Sheriffs and Ex-Officio Tax Collectors of the several parishes from within which the natural resources are severed, and by them shall be paid into the State Treasury as collected, and, unless otherwise herein provided, in the same manner and at the same time as required by law for other state collections.

When so paid into the State treasury, all of the severances taxes collected on oil, gas, salt and shells, not otherwise allocated herein, together with all of the severance taxes collected on all other natural resources severed from the soil or water, shall be credited by the auditor and treasurer to a special fund, which is hereby created to be known as the Severance Tax Fund of the State of Louisiana.

One-fifth (1/5th) of the severance taxes collected on oil, gas, shells, timber, sand, and gravel, is hereby allocated to the parish from which such taxes are collected, and shall be credited to such parish by the auditor and treasurer, provided such allocation and credit shall not exceed Two Hundred Thousand ($200,000.00) Dollars in any parish in any one year. When this limit of Two Hundred Thousand ($200,000) Dollars shall have been reached, there shall be no further allocation, and all additional collections for the year shall be credited in full to the Severance Tax Fund hereinbefore created."

That Section 5 of Act 140 of 1922 be amended and re-enacted so as to read as follows:

"SECTION 5. Every person, firm, corporation or association of persons severing any natural resources from the soil or water in this State shall, within thirty (30) days after the expiration of each quarter-annual period expiring, respectively, on the last day of March, June, September and December of each year, file with the Supervisor of Public Accounts a statement under oath, on forms prescribed by him, of the business conducted by such person, firm, corporation or association of persons, during the last preceding quarter-annual period, showing the kind of natural resources and the gross quantity of each so severed or produced, the names of the owners at the time of severance, the portion owned by each, and such other reasonable and necessary information pertaining thereto as the Supervisor of Public Accounts may require for the proper enforcement of the provisions of this Act. There shall also be shown on such quarterly reports the location of each

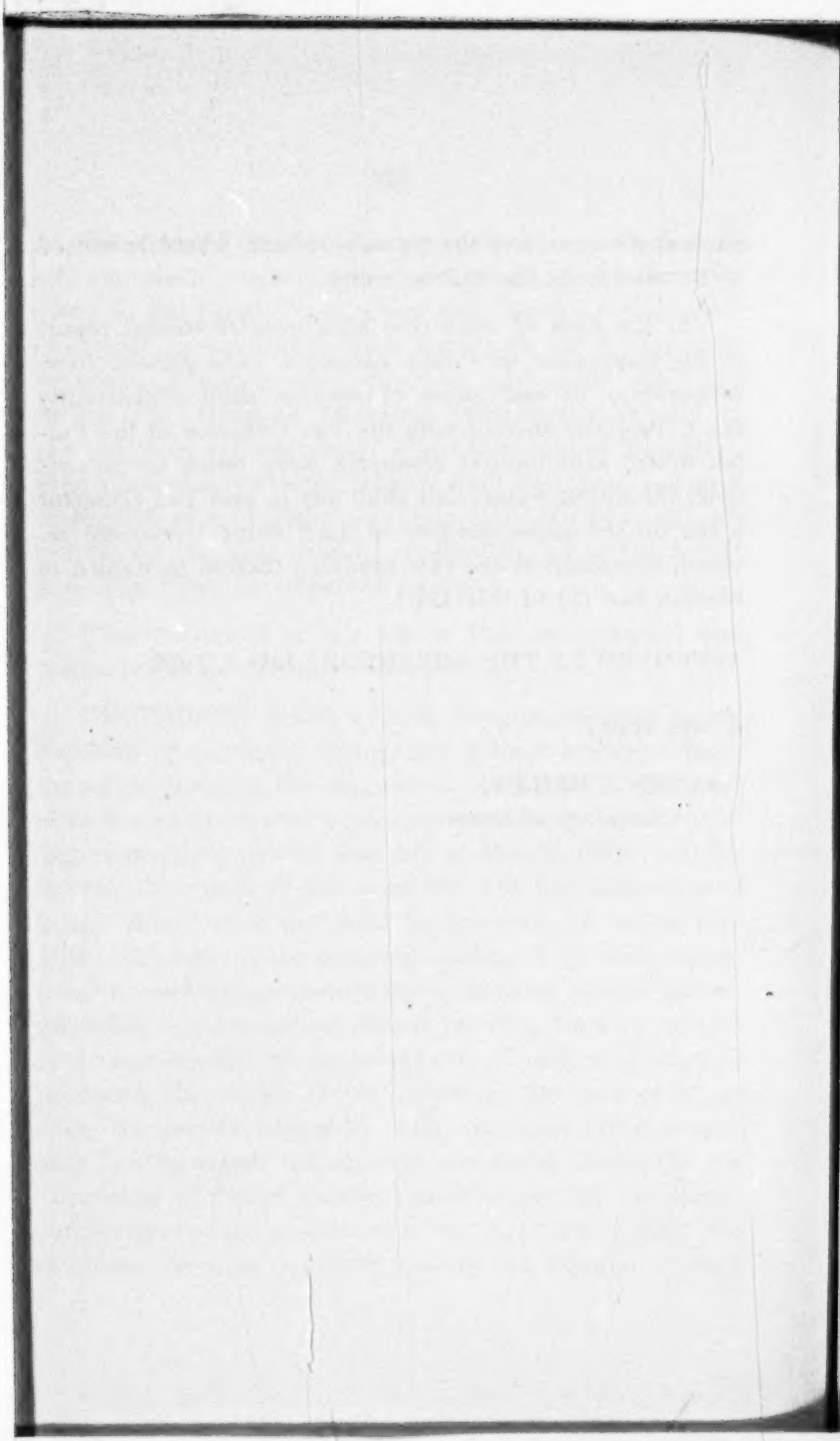
natural resource and the place or places where produced or severed from the soil or water.

At the time of rendering such quarter-annual report to the Supervisor of Public Accounts, each person, firm, corporation, or association of persons, shall concurrently file a duplicate thereof with the Tax Collector of the Parish where said natural resources were taken or severed from the soil or water; and shall pay to said Tax Collector a tax on the gross quantity of each natural resource severed, computed at the rate applying thereto as named in Section two (2) of this Act."

APPROVED BY THE GOVERNOR: July 7, 1928.

A true copy:

JAMES J. BAILEY,
Secretary of State.



SUPREME COURT OF THE UNITED STATES.

No. 468.—October Term, 1929.

Emmett Cochran, W. M. Guice, Jr., Henry Steinau, et al., Appellants, *vs.* Louisiana State Board of Education, et al. } Appeal from the Supreme Court of the State of Louisiana.

[April 28, 1930.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The appellants, as citizens and taxpayers of the State of Louisiana, brought this suit to restrain the State Board of Education and other state officials from expending any part of the severance tax fund in purchasing school books and in supplying them free of cost to the school children of the State, under Acts No. 100 and No. 143 of 1928, upon the ground that the legislation violated specified provisions of the constitution of the State and also section 4 of Article IV and the Fourteenth Amendment of the Federal Constitution. The Supreme Court of the State affirmed the judgment of the trial court which refused to issue an injunction. 168 La. 1030.

Act No. 100 of 1928 provided that the severance tax fund of the State, after allowing funds and appropriations as required by the state constitution, should be devoted "first, to supplying school books to the school children of the State". The Board of Education was directed to provide "school books for school children free of cost to such children." Act No. 143 of 1928 made appropriations in accordance with the above provisions.

The Supreme Court of the State, following its decision in *Borden* v. *Louisiana State Board of Education*, 168 La. 1005, held that these acts were not repugnant to either the state or the Federal Constitution.

No substantial Federal question is presented under section 4 of Article IV of the Federal Constitution guaranteeing to every State

a republican form of government, as questions arising under this provision are political, not judicial, in character. *State of Ohio ex rel. Bryant* v. *Akron Metropolitan Park District*, decided March 12, 1930, and cases there cited.

The contention of the appellant under the Fourteenth Amendment is that taxation for the purchase of school books constituted a taking of private property for a private purpose. *Loan Association* v. *Topeka*, 20 Wall. 655. The purpose is said to be to aid private, religious, sectarian and other schools not embraced in the public educational system of the State by furnishing text-books free to the children attending such private schools. The operation and effect of the legislation in question were described by the Supreme Court of the State as follows (168 La., p. 1020):

"One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian or even public school. The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or non-sectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries. It is also true that the sectarian schools, which some of the children attend, instruct their pupils in religion, and books are used for that purpose, but one may search diligently the acts, though without result, in an effort to find anything to the effect that it is the purpose of the state to furnish religious books for the use of such children. . . . What the statutes contemplate is that the same books that are furnished children attending public schools shall be furnished children attending private schools. This is the only practical way of interpreting and executing the statutes, and this is what the state board of education is doing. Among these books, naturally, none is to be expected, adapted to religious instruction".

The Court also stated, although the point is not of importance in relation to the Federal question, that it was "only the use of the books that is granted to the children, or, in other words, the books are lent to them."

Viewing the statute as having the effect thus attributed to it, we can not doubt that the taxing power of the State is exerted for a

public purpose. The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.